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80-1798

No. ....

IN THE

Supreme Court of the United States

October Term, 1980.

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTIONS PRESENTED.*

1. Does the existence of a collective-bargaining relationship between a construction union and a construction employer invariably legalize a secondary-boycott agreement inherent in a union-signatory subcontractor clause under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e)?
2. Did the Court of Appeals misinterpret this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), by holding that the construction industry proviso to Section 8(e) of the Act privileges broad union-signatory subcontracting provisions which are not designed to eliminate jobsite friction between union and non-union workers at a particular construction jobsite?
3. Does Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in "top-down" organizing by striking or picketing to force a contractor to execute an agreement containing a union-signatory subcontractor clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?

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*The questions presented in this case are similar and related to those in *Donald Schriver, Inc., et al. v. N.L.R.B.*, numbered in this Court as Case No. 80-1257, in which a petition for writ of certiorari has been filed.

LIST OF PARTIES TO PROCEEDING BELOW.

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

The caption of the within matter contains a listing of the names of all parties in the proceeding below in this matter which was numbered Case No. 78-3468 in the U. S. Court of Appeals for the Ninth Circuit.

However, the within matter was consolidated with other cases for purposes of oral argument and decision below. See Case Nos. 78-3469, 78-3487, 78-3619, and 79-7011. The parties to those other cases in the proceeding below were:

1. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.;

2. Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.;

3. International Union of Operating Engineers, Local No. 701; and

4. National Labor Relations Board.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Woelke & Romero Framing, Inc., respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment of the U.S. Court of Appeals for the Ninth Circuit which was entered in this proceeding on April 17, 1981.[1]

[1]The within matter was numbered Case No. 78-3468 in the Court of Appeals, and was consolidated for argument and decision with certain other related cases. The National Labor Relations Board was the Respondent below, and the Unions were Intervenors below.

Statutory Provisions Involved.

United States Code, Title 29:

§158(b)(4)(i) and (ii)(A)

"It shall be an unfair labor practice for a labor organization or its agents — (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);"

§158(e)

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

Opinions and Orders Below.

The judgment and opinion of the limited *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit, which was entered in this matter on April 17, 1981, is styled, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., etc., et al. v. National Labor Relations Board, et al.*, and is not yet officially reported. It appears as Appendix A.

The prior judgment and opinion of a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit which was issued on December 26, 1979, is officially reported at 609 F.2d 1341 (9th Cir. 1979), and appears as Appendix B.

The Decision and Order of the National Labor Relations Board ("Board"), which was reviewed by the U.S. Court of Appeals for the Ninth Circuit pursuant to a Petition for Review filed under 29 U.S.C. §160(f), is officially reported at 239 N.L.R.B. 241 (1978), and appears as Appendix C.

Jurisdiction of the Supreme Court.

The judgment and opinion of the limited *en banc* panel of the U.S. Court of Appeals for the Ninth Circuit was entered on April 17, 1981. No petition for rehearing, or for further hearing before the full Court, has been filed.

The U.S. Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). See, 29 U.S.C. §§160(f) and 160(e).

Statement of the Case.

Statement of Facts.

Woelke & Romero Framing, Inc. ("Woelke & Romero"), is a framing subcontractor in the building and construction industry in Southern California and, insofar as relevant to the time period herein involved, had construction subcontracts with various general contractors and builders

calling for Woelke & Romero to perform construction framing work.

Woelke & Romero had had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions, including Carpenters Local 944 and Carpenters Local 235 ("Unions") involved in this case, since at least 1974. The most recent collective-bargaining agreement was due to expire June 15, 1977.

Between June 3 and August 4, 1977, the Unions and Woelke & Romero engaged in collective-bargaining for a successor agreement. On August 4, 1977, the Unions and Woelke & Romero reached an impasse in bargaining over various proposals, including the Unions' proposal dealing with the subcontracting of work which contained the following "subcontractor clauses":

> "103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."
>
> "103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.
>
> "103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of

material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement." (Pet. App. C, pp. 78-80)[2]

Since August 4, 1977, no further collective-bargaining sessions have been held. In support of the Unions' demand for the above contract provisions, the Unions picketed at the construction jobsites at which Woelke & Romero was working. As a result of the picketing, individuals employed by various other subcontractors engaged in work stoppages and refusals to perform services for their respective employers.[3]

Proceedings Below.

On August 11, 1977, Woelke & Romero filed an unfair labor practice charge alleging that the Unions had violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4)(i) and (ii)(A), by picketing at various jobsites to force Woelke & Romero to enter into a collective-bargaining agreement containing the union-signatory subcontracting restrictions which it believed were violative of Section 8(e), 29 U.S.C. 158(e), of the Act. On September 23, 1977, the Board's General Counsel issued a Complaint on the charge, and the matter was later presented to the Board on a Stipulation of Facts. Oral argument in this and certain other related proceedings was held before the Board in Washington, D.C., on February 23, 1978. On November 13, 1978, the Board issued its Decision and Order finding and concluded that the sought clauses were not un-

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[2]The Appendix herein will be cited to as "Pet. App." followed by a reference to the appropriate appendix and page number.

[3]The Unions sought additional clauses which are set forth in Appendix (Pet. App. C, pp. 78-80)

lawful under the Act, and that the Unions had not violated the Act by picketing to obtain them.[4]

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the Act, 29 U.S.C. §160(f), on November 14, 1978, Petitioner filed a Petition for Review of the Board's Decision and Order with the U.S. Court of Appeals for the Ninth Circuit.

On December 26, 1979, a three-judge panel of the Court of Appeals entered its consolidated judgment and opinion in this and the other related cases, *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., et al. v. N.L.R.B., et al.*, 609 F.2d 1341 (9th Cir. 1979). The three-judge panel reversed the Board in material part and sustained Woelke & Romero's Petition for Review. On January 30, 1980, the Board and the Unions filed petitions for rehearing, and rehearing *en banc*.

On August 19, 1980, the Court of Appeals issued an Order granting the petition for rehearing *en banc* and ordered

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[4]When this matter was pending before the Board in 1978, it was consolidated with several related proceedings. Because of their importance in the application of the Act, the Board took the unusual step of hearing 7 hours of oral argument with respect to this and the related proceedings, and decided all of them together. *See, Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 N.L.R.B. 253 (1978); *Los Angeles Building and Construction Trades Council;* and *Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates)*, 239 N.L.R.B. 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 N.L.R.B. 274 (1978). The *Schriver* case was thereafter appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and the *Woelke & Romero* and *Pacific Northwest* cases were appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Board's view of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975) was stated in its *Woelke & Romero* decision.

This case presents questions and issues closely related to those in *Donald Schriver, Inc. et al. v. N.L.R.B.* now pending on a petition for writ of certiorari before this Court in Case No. 80-1257.

the matter reheard before a limited *en banc* panel of the Court of Appeals as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of the local rules of the U.S. Court of Appeals for the Ninth Circuit.

On October 16, 1980, oral argument before a limited *en banc* Court was held in San Francisco, California. On April 17, 1981, the *en banc* Court issued its judgment and opinion.

The Decisions of the Board and Court of Appeals Below.

The Board concluded that the subject contract clauses were union-signatory subcontractors clauses which obligate the employer not to do business with another unless the latter is signatory to the union's agreement.[5] The Board construed them to be secondary in thrust and within the scope of Section 8(e) of the Act because the clauses are addressed to the labor relations policies of *other* employers vis-a-vis their employees. The Board further found that the clauses were privileged by the construction industry proviso to Section 8(e) of the Act since they were sought within the context of the Unions' collective-bargaining relationship with Woelke & Romero. The Board also found that the Unions, therefore, did not violate Section 8(b)(4)(A) of the Act by striking and picketing Woelke & Romero to force its agreement to the clauses.

The Board's decision that the subcontracting provisions were privileged by the proviso construed this Court's decision in *Connell Construction Co., Inc. v. Plumbers &*

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[5]The expression "union-signatory subcontractors clauses" refers to the type of restrictive subcontracting agreement which obligates the chosen subcontractor to have the very same agreement with a particular union and to be bound by all of its provisions. The "secondary" thrust of such agreements comes from the requirement that *all* provisions be acknowledged by the subcontractor, including those dealing with union-recognition, hiring from the union's hiring hall, and provisions forcing the subcontractor's employees to observe the requirement to *join* a particular union as a condition of continued employment under the union-security provisions of the contract.

Steamfitters, Local Union 100, 421 U.S. 616 (1975), as follows:

> ". . . the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem . . ." 239 N.L.R.B. at 250 (Pet. App. C, pp. 97-98)

The Board considered, but rejected, the contention that this Court's decision in *Connell* required that the shelter of the construction industry proviso to Section 8(e) be limited to only those secondary jobsite subcontracting agreements which are *both* (1) contained in the context of a collective-bargaining relationship, *and* (2) operational at times and sites at which the employer has employees represented by the union, and do not require bargaining relationships with a particular union. 239 N.L.R.B. at 248. In effect, the Board held that the mere existence of the collective-bargaining relationship between the Unions and Woelke & Romero, invariably and without more, was sufficient to give the clauses legal shelter under the proviso.

The Court of Appeals initially disagreed with the Board. Speaking for a unanimous three-judge panel of the Court of Appeals, Judge Sneed held the clauses outside the proviso because they were broader than the proviso's purpose and operational even at sites when and where no union workers were employed:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a non-union subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v.*

N.L.R.B., et al., 609 F.2d 1341, 1347 (9th Cir. 1979). (Pet. App. B, p. 62)

However, that decision was later vacated, and a limited *en banc* panel of the Court of Appeals split 7-4, and sided with the Board and the Unions. (Pet. App. A, p. 1) The majority of the *en banc* Court, in an opinion written by Judge Canby, concluded that the proviso shelters union-signatory subcontractor clauses without regard to the presence or absence of union workers at the jobsite, so long as such clauses are contained in or sought as part of a collective-bargaining relationship. Further, the *en banc* majority concluded that unions may strike employers to force the execution of such clauses:

> "We find that provisions in a collective-bargaining agreement forbidding the signatory employer to subcontract work at a construction site to firms that do not have a contract with the signatory union are within §8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and non-union workers. We also find that unions may picket or strike to induce employers to enter such agreements . . ." (Pet. App. A, p. 43)

The *en banc* minority in a dissenting opinion written by Judge Sneed and joined by Judges Choy, Anderson and Farris, concluded that the original three-judge panel opinion of the Court was correct, and that the import of this Court's decision in *Connell* required the view that the proviso sanctioned only those clauses which were both in the context of a bargaining relationship and which were operational only at sites when union workers worked alongside non-union workers. (Pet. App. A, p. 44)

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

This case raises ". . . *important* questions concerning the scope of 8(e) of the National Labor Relations Act . . ." (Pet. App. A, p. 1). (emphasis added)

In that manner, the *en banc* Court below began its majority opinion legalizing broad "cease doing business" agreements. Its holding that a construction union may enter into broad union-signatory subcontractors clauses, and may picket to secure them, so long as the clauses are part of or sought in a collective-bargaining relationship, effectively permits a construction union to engage in unlimited "top-down" organizing contrary to decisions of this Court and to Congress' legislative judgment. Moreover, the *en banc* majority's reasoning fails to give credence to this Court's prior holding that the proviso's shelter must be limited to clauses whose purpose is to alleviate jobsite frictions on particular common-situs construction sites.

This Court previously has recognized that broad union-signatory subcontractors clauses, such as those validated by the decision below, can have far-reaching adverse consequences. In *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), this Court, considering a clause almost identical to those here, noted in an anti-trust context that such provisions outside a bargaining relationship were not related to any policies protected by the labor laws, and that such provisions could have the potential to restrain competition in ways that ". . . would not follow naturally from the elimination of competition over wages and working conditions." *Id.*, at 625.

The broad union-signatory subcontractor clauses involved here are "agreements to conduct a secondary boycott". As such, their validation can only serve to cause substantial and significant policy conflicts under the federal labor laws

such as (1) the statutory right of workers to freely choose their bargaining representative without the coercive "top-down" organizing inherent in secondary-boycott union-signatory subcontractor clauses vs. the desire of construction unions to utilize subcontractor clauses as "top-down" organizing tools because of the nature of the construction industry, and (2) a construction union's interest in standardizing wages and working conditions vs. the right of construction users, owners, developers, and general contractors to determine the identity of the firms with whom they will do business without broad union restraints on that choice.

The delicate balance between these policy questions was struck incorrectly by the Court below in favor of a construction union's unrestrained use of union-signatory subcontractor clauses and against the statutory and common-law rights of workers and employers.

The decision below, thus, adversely affects the construction industry and federal labor policy. Thousands of construction workers who have chosen to remain non-union, or who have chosen to be represented by other than the "correct" union are penalized for such a choice: their work opportunities are lessened by their employers' ineligibility to compete for work in a certain segment of the construction market. Moreover, the construction users' and general contractors' acknowledged freedom to determine the most efficient, and perhaps the least costly, manner of performing work has been restrained.

Hence, the important matters of federal policy presented by the issues in this matter and by the decision below reveal the necessity for their review and resolution by this Court.

ARGUMENT.

The Decision Below Conflicts With This Court's Decision in Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, 421 U.S. 616 (1975).

The pivotal question before the Court of Appeals was: how broad an exemption from Section 8(e) of the Act did Congress intend to give construction unions when it added

the construction industry proviso to that Section? That was the same question presented to this Court in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*. The Court of Appeals and this Court are in conflict on the answer to this question, and this conflict requires prompt resolution by this Court.

In *Connell*, this Court concluded that the proviso's exemption had to be determined in light of the statutory setting surrounding its enactment. After reviewing that setting, it narrowed the proviso's literal meaning, asserting that its exemption is narrower than its words. Fairly interpreted, *Connell* holds that the shelter, if any, given secondary subcontract provisions by the proviso is no greater than the reason for the proviso's enactment. *Id.*, at 628.

In *Connell*, the union demanded that Connell execute an agreement which would have required that Connell subcontract its plumbing mechanical work only to firms which had agreements with Local 100. When Connell refused to execute the agreement, Local 100 picketed Connell's jobsite to compel its execution. Connell did not normally perform plumbing mechanical work with its own employees, and Local 100 was not and did not want to be the collective-bargaining representative of any of Connell's employees. The Court, when presented with the question as to whether or not this particular subcontracting agreement fell within the protection of the construction industry proviso to Section 8(e) of the Act, held that although the agreement appeared privileged by the proviso's words, the agreement was not so privileged because, in the Court's opinion:

> "... we think [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633.

This Court interpreted the construct construction industry proviso as "a measure designed to allow [certain secondary] agreements" pertaining to work on a construction site, *because of* the close community of interests shared by workers there, including the interest of avoiding the frictions that may arise when union men work continuously alongside non-union men at a construction site. *Id.*, at 630.[6]

The decision below, however, concluded that the prevailing thrust of *Connell* favors a "*broader* view of the [construction industry proviso's] exemption" (Pet. App. A, p. 23) that would essentially permit all union-signatory subcontractor clauses, even those which are not directly related to union worker vs. non-union worker "interests" on a

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[6]*Accord, International Union of Operating Engineers, Local 542 (York County Bridge)*, 216 N.L.R.B. 408, 409 (1979), *enforced*, 532 F.2d 902 (3rd Cir. 1976) ("The 8(e) proviso was intended to prevent labor strife among non-union and union employees at the same jobsite"); *Drivers, Salesmen, etc., Local 695 v. N.L.R.B.*, 361 F.2d 547, 553 (D.C. Cir. 1966) ("The purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site"); *Essex County and Vicinity District Council of Carpenters v. N.L.R.B.*, 332 F.2d 636, 640 (3rd Cir. 1964) ("This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft union men to work alongside non-union men on the same project"); *Associated General Contractors of California, Inc. v. N.L.R.B.*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and non-union employees on the same jobsite").

Obviously, the "close community of interests" referred to by the Court includes the narrower "shoulder-to-shoulder" purpose. However, the "close community of interests" purpose is no broader than the purpose behind the 1959 Congressional proposals to overrule *Denver Building Trades, see* 421 U.S. at 629, and is no broader than the protection of the common interests shared by all workers at the common situs— ". . . they work *side by side and the wages and working conditions of one trade affect all the others.*" II, *Leg. Hist. of Labor-Management Reporting and Disclosure Act of 1959*, at 1577.

Accordingly, it would appear that the proviso's sanction is clearly no broader than the protection of the union's interest in preventing *jobsite tension* between the union and non-union workers over their union versus non-union status or their working conditions.

particular construction site. In this regard, the *en banc* Court of Appeals suggests that the maintenance of industry-wide contract standards or preserving the general continuity in benefits of the unions' members are interests protected by the proviso. (Pet. App. A, pp. 26-27, and p. 51, Judge Farris, dissenting.)

This Court's view of the exemption provided by the proviso and that of the Court of Appeals are, hence, in direct conflict.

This Court's view of the proviso would shelter only those otherwise secondary agreements which are related to the proviso's jobsite interests. The latter would shelter those which are related to general construction union interests such as maintaining industry-wide contract standards.[7]

Under this Court's rationale, subcontractor clauses which restrict a contractor from subcontracting to non-union subcontractors are sheltered by the Section 8(e) proviso only if there are in the context of a collective-bargaining relationship and then only if they are limited in language, purpose, and use to the union's interest on particular jobsites in alleviating the frictions that may arise between union and non-union workers at the site, or to some other specific interest at a particular site.[8]

Under the Court of Appeals' rationale, such clauses are sheltered invariably by being in a collective-bargaining re-

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[7]The *en banc* Court's apparent view that Congress intended for the proviso to protect contract standards in the construction industry does not find any definitive support in the legislative history to Section 8(e) or its proviso. Moreover, "contract standards" would appear to be capable of protection by a primary "union standards" clause which would be outside the general thrust of Section 8(e) and, thus, not covered by the proviso in any event. See, dissenting opinion of Judge Farris at Pet. App. A, p. 51)

[8]As Petitioner understands *Connell*, the words "collective-bargaining relationship" refer to one where the contractor employs workers represented by the signatory union at the particular jobsite. It is only then that the contractor is not a "stranger" to the union.

lationship without regard to the purposes served by such clauses or the magnitude of the restraint on doing business involved.

The Court below buttressed its conclusion by remarking that Congress was aware of and approved a "pattern of collective-bargaining," which included broad union-signatory subcontractor clauses, and that Congress thus *intended* for the proviso to legalize these specific kinds of clauses. (Pet. App. A, p. 24).

However, this Court has dismissed the legislative history reference to a "pattern of collective bargaining" as support for the reason for enactment of the proviso. 421 U.S. at 628-29. This Court felt that the proviso was a "partial substitute" for legislatively overruling this Court's decision in *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), and confined the proviso's purpose and exemption to that problem.

The Court of Appeals' decision does not so limit the proviso, but expands it to permit a construction union to utilize union-only subcontracting provisions simply because they are contained in a union contract and recite that they will apply to some construction site, somewhere. This is contrary to this Court's belief that such clauses are legitimated by the proviso only where they are limited to particular construction sites involving common-situs interests.[9]

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[9]Professor Gorman, has concluded:

> "*Because of the frictions* traditionally created by the presence in the construction industry of union and nonunion employees working side-by-side at the jobsite, *section 8(e) expressly exempts* from its ban hot cargo provisions 'relating to the contracting or subcontracting of work to be done at the site of the construction.'
>
> "....
>
> "The [*Connell*] Court read the legislative history of the construction industry proviso to evidence a *Congressional concern for the union which used the hot cargo agreement in order to eliminate the friction of having union and nonunion employees working alongside each other on a construction site*. This policy

(footnote continued on following page)

The Court of Appeals' approval of broad union-signatory subcontractor clauses restrains the contractor's subcontractor's employees in the selection of their collective-bargaining representative, forcing them to choose the signatory union as their representative and economically penalizing those employees for their free choice not to be represented by the signatory union, a different union or no union, by making their employer ineligible to compete for certain work. Permitting this type of economic coercion in aid of a construction union's organizing would open that glaring loophole in the Act's restrictions on "top-down" organizing not intended by Congress or by this Court, *Id.* at 633. As this Court has stated before: "The Act is wholly neutral when it comes to that basic choice [for or against a particular union.]" *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973). The Court of Appeals' decision taints the neutrality of the Act, contrary to this Court's and Congress' intent.

This Court concluded in *Connell* that Congress intended that garment industry unions could use subcontractor agreements as organizational weapons, but that construction unions were *not to be permitted* to use broad top-down economic pressure in aid of organizational goals. *Id.*, at 630 (". . . Congress did not . . . indicate that [construction unions] were free to use subcontracting agreements as a

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was inapplicable to the union in *Connell because that union was not seeking to protect the employees of the general contractor* (whom they were not organizing) from working alongside nonunion employees, was not seeking thus to protect its own members (since the ban on subcontracting would apply even on jobsites at which these members were not yet employed, and even if they were employed the ban would not forbid the use of other nonunion subcontractors), and was not seeking to organize any particular nonunion subcontractor on the jobsite at which the picketing took place (since the objective was generally to exert pressure on mechanical subcontractors in the Dallas area). The Court doubted that Congress intended to shelter hot cargo agreements with contractors who were 'strangers' to the union, thereby giving construction unions 'an almost unlimited organizational weapon' in achieving 'top-down' organizing against the wishes of employees." R. Gorman, *Basic Test on Labor Law* 271-73 (West, 1976) (emphasis added).

broad organizational weapon.") The Court of Appeals' decision permits the very vice this Court did not believe should be the province of construction unions.

In sum, the decision below is contrary to the language, policy, and intent of this Court's *Connell* decision. Consequently, the Court of Appeals' conclusion that the ". . . existence of a collective-bargaining relationship *clearly* brings a union-signatory subcontracting agreement within the proviso to 8(e) . . ." was wrong. This error requires prompt review and reversal by this Court.

The Decision Below Presents Important Questions, Previously Unanswered by This Court, Concerning the Extent of the Validity Under Section 8(e) of the Act of Agreements to Conduct Secondary Boycotts in the Construction Industry.

In *Local 1976, United Brotherhood of Carpenters etc., et al. v. N.L.R.B.* (*Sand Door and Plywood Company*), 357 U.S. 93 (1958), this Court exhaustively examined the legislative history, meaning, and reach of Section 8(b)(4) of the Act as applied to a construction union's attempted use of a "hot cargo" clause — an agreement to conduct a secondary boycott — in a collective bargaining agreement as a defense to that Section of the Act. This Court held that such a provision, even if voluntarily agreed to, could not be such a defense.

But this Court, in *Sand Door*, did not reach the validity or legality of such a provision contained in a collective-bargaining agreement. Indeed, the Court stated: "There is no occasion to consider the validity of hot cargo provisions as such." 357 U.S. at 107.

When Congress attempted to strike down "hot cargo" clauses in the main portion of Section 8(e) and to exempt from that prohibition certain agreements relating to the contracting of work to be done at construction sites, it *assumed* the legality of the latter agreements. Thus, the legislative

history to Section 8(e) and the proviso contains statements that such jobsite construction agreements ". . . *appear to be* legal today. . . ." II, *Legislative History of the LMRDA of 1959*, p. 1433.

This Court had not then so ruled, and it has not yet definitively done so. This Court's decisions in *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612 (1967), and *Houston Insulation Contractors Ass'n v. N.L.R.B.*, 386 U.S. 664 (1967), dealt with the primary-secondary scope of Section 8(e) of the Act, but not with the application of that Section's construction industry proviso.

This Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*, did construe the application of the construction industry proviso to a "hot cargo" clause — specifically, a union-signatory subcontractor clause — but did so in an anti-trust context and in a situation not involving a collective-bargaining agreement.

Hence, this case presents an appropriate vehicle for this Court now to delineate what it left open in *Sand Door* and did not definitively determine in *Connell*: the extent of the validity or invalidity of "hot cargo" provisions, including union-signatory subcontractor clauses, in construction industry collective-bargaining agreements, and the types of such agreements Congress meant to protect under the proviso to Section 8(e).

Such a determination, of necessity, will require an examination of the purpose of the enactment of Section 8(e) and its construction industry proviso, an examination initially articulated by this Court in *National Woodwork Manfacturers Ass'n v. N.L.R.B., supra*, continued, exhaustively, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra*, and in need of further clarification by this Court to clear up ambiguities remaining after *Connell*. Thus, on the question of the pur-

pose and breadth of the proviso, the decision below was adverse to Petitioner. But, as the majority of the *en banc* Court noted:

> "[T]he *Connell* decision, . . . admittedly has language that might point to *either* result . . ." (emphasis supplied) (Pet. App. A, p. 39)

Indeed, the *en banc* Court below split 7-4 on the question of the congressional intent behind the proviso, on the question of the validity of the subcontractor clauses at issue, and on the interpretation of the *Connell* opinion's language concerning the shelter afforded such agreements by the proviso. The four dissenting judges concluded that the subcontractor agreements in issue could not be privileged by the proviso because in their view, and, the now-vacated view of the three-judge panel of the Court, 609 F.2d 1341 (9th Cir. 1979), subcontractor clauses are privileged only in the context of a collective-bargaining relationship *and* then only if applicable to particular jobsites where union workers are working with non-union men.

In contrast, the seven judges in the majority, admitting the ambiguity of the words, stated:

> "Finally, in summarizing the proviso's effect, the *Connell* Court stated:
>
> > '[W]e think its authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.'
>
> 421 U.S. at 633. *While it might be susceptible to another reading*, (emphasis supplied) we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to §8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may

> be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37]'' (Pet. App. A, 37)

The seven-judge majority added that the Courts and commentators have varied in their understanding of whether or not the above-quoted *Connell* language requires both a collective-bargaining relationship and a limitation to particular jobsites. (Pet. App. A, p. 37, n.37).

Clarification of the extent of the proviso's shelter is now needed in view of the lack of clarity in *Connell* on this point. For example, a distinguished commentator has stated:

> ''Logically, under the [*Connell*] majority's rationale, either the existence of a collective bargaining relationship or the limitation of the agreement to particular jobsites (where union men are working?) would appear to be a separate, independent basis for Section 8(e) proviso coverage and concomitant antitrust immunity. *The Connell opinion is not clear on these points.*'' (emphasis added.)

St. Antoine, ''*Connell: Antitrust Law At The Expense of Labor Law,*'' 62 Va. L. Rev. 603, 619 n.74 (1976).

The instant case presents the opportunity for this Court to give the industry and the Courts definitive guidance on when these ''secondary boycott'' agreements, even though contained in a collective-bargaining relationship, are legitimated by the proviso to Section 8(e). The Court should take this opportunity to do so in view of the substantial importance the case has in the application of the Act to construction industry unions, workers, and employers, and in view of the substantial conflict within the Court of Appeals below on this issue.

The Extent of a Construction Union's Right to Engage in Top-Down Organizing by Picketing Employers to Obtain Union-Signatory Subcontracting Agreements Has Not Been and Should Be Determined by This Court.

The Court of Appeals' decision sustains the Board's view that a construction union can utilize strikes and picketing to obtain a union-only subcontracting agreement if that agreement is otherwise protected by the construction industry proviso to Section 8(e) of the Act. (Pet. App. A, pp. 40-41). This conclusion of both the Board and the Court of Appeals is contrary to the legislative history behind the enactment of the proviso and Section 8(b)(4)(A) of the Act.

This Court has never determined the extent to which a construction union can utilize coercive conduct to extract union-signatory subcontracting agreements from unwilling employers. It should take the opportunity to do so in this case.

In this regard, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra,* this Court acknowledged the contention that the proviso to Section 8(e) of the Act was intended to permit only *voluntary* jobsite subcontracting agreements. In view of its holding that the agreement there was outside the proviso, this Court did not reach the issue. 421 U.S. at 634, n.14. As this Court noted in *Connell,* the foundation for this contention was that Congress intended Section 8(b)(4) of the Act to forbid such picketing. *Id.*

Subsequent to the 1959 congressional amendments which added Section 8(e), its proviso, and Section 8(b)(4)(A) to the Act, the Board construed the legislative history to these Sections to mean that Section 8(b)(4) outlawed *all* picketing or economic coercion designed to force an employer to enter into union-signatory subcontracting agreements otherwise protected by the proviso. *Construction, Production, and*

Maintenance Laborers Union, Local 383 (Colson and Stevens Construction Co., Inc.), 137 N.L.R.B. 1650 (1962), *enf. denied*, 323 F.2d 422 (9th Cir. 1963). The Board's position in *Colson and Stevens* was fairly straight-forward. It found support in the Conference Report to the House dealing with the enactment of the proviso to Section 8(e) for the proposition that Congress intended for the proviso to permit only voluntarily-entered subcontracting agreements. Thus, in the Board's view, if such were entered into involuntarily, they were prohibited by Section 8(e) and the coercion used to exact them would be within the literal proscription of Section 8(b)(4)(A) of the Act. *Id.*, 137 N.L.R.B. at 1651-52.

The circuit courts which considered the issue shortly thereafter disagreed with this view. *Essex County and Vicinity District Council of Carpenters and Millwrights v. N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. N.L.R.B.*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383*, 323 F.2d 422 (9th Cir. 1963). The Board subsequently agreed with those courts that since Section 8(b)(4)(A) referred to only "agreements prohibited by Section 8(e)," the construction proviso was incorporated by that reference and that it, thus, literally permitted picketing and strikes to force a construction employer to agree to a proviso-protected subcontracting clause. *Northeastern Indiana Building and Construction Trades Council (Centrilivre Village Apartments)*, 148 N.L.R.B. 854 (1964).

Adherence to this rule by the Court, below, which is at variance with the legislative history, permits a construction union to do that which Mr. Justice Powell, writing for a majority of the Court in *Connell*, stated was contrary to congressional intent: permitting construction unions to use broad subcontracting agreements as "top-down" organizing tools. Here, the Unions are and have been at liberty to strike and picket Woelke & Romero because the latter would not

agree to take part in the Unions' top-down organizing inherent in agreeing to the subcontractor clause. Woelke & Romero is now and has been powerless to resist the Unions' coercive pressure except by executing the agreement. Section 8(b)(7) of the Act, 29 U.S.C. §158(b)(7) affords no remedy, contrary to the implication of the *en banc* majority below (Pet. App. A, p. 36) inasmuch as that Section applies only to picketing for the purposes of acquiring initial union recognition and not to picketing in furtherance of contract demands during an existing bargaining relationship. *N.L.R.B. v. Iron Workers, Local 103 (Higdon Contracting)*, 434 U.S. 335 (1978). The Court of Appeals below has stated that Section 8(b)(4)(A) of the Act does not prohibit the Unions' conduct. The Unions' coercive force for a top-down organizing agreement is, therefore, unlimited and unrestrained here: even though Woelke & Romero had a bargaining relationship with the Unions and did say "No" to them when it was asked to sign a contract containing those provisions, it subjected itself to unrestrained picketing pressure to force it to so agree as a penalty for that bargaining position. This Court has doubted that Congress intended for construction unions to have such unrestrained power. *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra,* at 631-32.

Further, this Court has heretofore indicated ". . . that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. . . ." *Id.*, 421 U.S. at 628. And, the circumstances surrounding its enactment show that Congress did not intend that restrictive secondary subcontracting agreements could be obtained by picketing. Thus, in explaining the Conference Report to the House dealing with the enactment of the proviso, Representative Barden, one of the conferees, stated:

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construc-

tion industry relating to the contracting or subcontracting of work to be done directly on the site of construction.

"This proviso is intended to permit what is now lawful and deals only with situations where there is a contractor or subcontractor relationship and not to situations where there is no privity of contract between two or more contractors on a particular site. Such as in the case of cocontractors, each having direct contracts with the owner." (Emphasis added.) II, *Legislative History of the LMRDA of 1959*, p. 1715.

Since one of the major aims of the 1959 Act was to restrain and limit "top-down" organizing, to permit a construction union to avoid these restrictions by picketing to obtain a secondary union-signatory subcontractor clause would open a loophole in the Congressional scheme. *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100, supra* at 632-33.

Finally, inasmuch as part of the Congressional scheme may have been to preserve the law existing prior to 1959 as to a union's right, or lack thereof, to picket to obtain such agreements, it would be more in line with the Congressional intent to prohibit picketing to secure such agreements. The Board had held prior to 1959 that picketing to achieve a subcontractors clause was illegal under Section 8(b)(4). *See, e.g., Local 47, Teamsters (T. C. Bateson Construction Co., and Texas Industries)*, 112 N.L.R.B. 923 (1955), enf'd, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 N.L.R.B. 484 (1959), enf'd, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons etc. (Selby-Battersby & Company)*, 125 N.L.R.B. 1179 (1959). Consequently, it is also likely that Congress did not intend for Section 8(b)(4)(A) to be construed to overrule that body of law by permitting unions to picket to obtain binding agreeements not to deal with non-union firms.

This issue has plagued the industry since the 1959 amendments, and the vice of the current rule is plain. This Court should provide guidance as to the extent to which such coercive conduct may be permitted under the Act.

Conclusion.

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this matter.

Los Angeles, California
Dated: April 28, 1981

Respectfully submitted,

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APPENDICES

APPENDIX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner vs. National Labor Relations Board, Respondent. No. 78-3469.

Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3487.

International Union of Operating Engineers, Local No. 701, Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3619.

Woelke & Romero Framing, Inc., Petitioner, vs. National Labor Relations Board, Respondent, Carpenters Local No. 944 and Carpenters Local No. 235, Intervenors. No. 78-3468.

National Labor Relations Board, Petitioner, vs. Carpenters Local No. 944, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Respondent. No. 79-7011.

Petitions for Review of Orders of the National Labor Relations Board. Argued and submitted October 16, 1980.

Before: Browning, Chief Judge, Choy, Wallace, Sneed Anderson, Schroeder, Fletcher, Farris, Nelson, Canby and Norris, Circuit Judges.

Filed: April 17, 1981.

CANBY, Circuit Judge.

These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry pro-

viso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.
FACTS.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc., (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200 employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargaining agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

> Article VIII
>
> Subcontractors and Other Employers.
>
> *Section 1.* Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Subsequent clauses[1] provide for a grievance procedure leading to arbitration and further provide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings. . . ." The effect of the latter provision is to permit either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e)[2] of the National

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[1]Other relevant clauses of the AGC agreement are:

ARTICLE IX
Settlement of Disputes
Grievance Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * *

Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party . . ., then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings . . . and they shall not be considered in violation of any part of this Agreement.

ARTICLE X
Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement. . . .

[2]Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work . . . .

Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), a group which included Locals Number 235 and 944 involved in this litigation. That agreement expired on June 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse over several issues.[3] One such issue was the union's demand for a clause

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[3]Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foremen in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locals were charged with violation of § 8(b)(4)(i) and (ii)(A) of the Act[5] for picketing to require

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

[5]Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

an employer "to enter into any agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso, and that picketing to obtain such a clause therefore did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because their applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate § 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of this court.

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[6]Along with the present cases, reported at 239 N.L.R.B. 274 (*Pacific Northwest*) and 239 N.L.R.B. 241 (*Woelke*), the Board decided *Los Angeles Building & Construction Trades Council* (*Donald Schriver, Inc.*), 239 N.L.R.B. 264 (1978), and *Colorado Building & Construction Trades Council*, 239 N.L.R.B. 253. The Board's order upholding broad subcontractor agreements in *Schriver* was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. *Donald Schriver, Inc. v. NLRB*, Nos. 78-2177, 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

II.
ISSUES.

Four issues are presented for determination in these cases:

(1) Are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) to enforce them by picketing or strikes?

III.
APPLICABILITY OF § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangements that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The Court therefore held that an agreement between a union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to preserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as

primary and therefore did not constitute an unfair labor practice.[7] The test whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644.

By the *National Woodwork* test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees of the contracting employer by limiting the amount of subcontracting. Nor do they seek to protect the wage and benefit standards of those same employees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit. *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977); *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining

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[7] "Union standards" clauses, which require that an employer not subcontract with anyone whose wage and benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. *Truck Drivers Union Local No. 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *NLRB v. National Maritime Union*, 486 F.2d 907, 912 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. *NLRB v. National Maritime Union*, 486 F.2d at 914. Second, § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that [the clause] falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation for the employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union*, 196 N.L.R.B. 1100, 1101 (1972), enforced, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. *See NLRB v. National Maritime Union, supra*, at 913-14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, *NLRB v. Denver Building & Construction Trades*, 341 U.S. 675 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon their eligibility for inclusion within the construction industry proviso to that section.

IV.

SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO TO § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time

and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Indeed, it is the effect of *Connell* that provides the primary ground of controversy in the present litigation. We believe, however, that the *Connell* decision is best analyzed after a review of the state of the industry and the legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959); 1 *Legislative History of The Labor-Management Reporting and Disclosure Act of 1959* 423 (hereinafter Leg. Hist.). These peculiarities of the construction industry created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisfy these needs, unions and employers ham-

mered out a number of mutual accommodations. One such arrangement was the closed shop, which was prevalent in the industry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular employers.[10] A third device was the agreement to restrict subcontracting in various ways — to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially caused no disruption in the pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over that industry.[13] The Taft-Hartley Amendments to the Act, passed

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[8]Haber, Industrial Relations in the Building Industry 238-40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. *Id.* at 240.

[9]Dunlop, *The Industrial Relations System in Construction*, in The Structure of Collective Bargaining 255, 256-57 (Weber ed. 1961).

[10]S. Rep. No. 187, *supra*, 28; 1 Leg. Hist. 424. *See generally*, Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

[11]A union to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. *Levering & Garrigues Co. v. Morrin*, 71 F.2d 284 (2d Cir.), *cert. denied*, 293 U.S. 595 (1934).

[12] Marcus, *Secondary Boycotts*, in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961)(hereinafter referred to as LMRDA Symposium).

[13]*Brown and Root, Inc.*, 51 N.L.R.B. 820 (1943; *Johns-Manville Corp.*, 61 N.L.R.B. 1 (1945).

in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refrain from dealing in the products of any other employer or to cease to do business with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. *Guy F. Atkinson Co. and J.A. Jones Construction Co.*, 90 N.L.R.B. 143 (1950), *enforcement denied on other grounds*, 195 F.2d 1 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. *NRLB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951). The

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[14]The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 *supra*.

[15]Denham, *Taft Act's Impact on the Construction Industry, reprinted in* 21 L.R.R.M. 44 (1948). The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board decided *United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industry (Brown-Olds)*, 115 N.L.R.B. 594 (1956), and *Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific)*, 119 N.L.R.B. 883 (1958), *remanded on other grounds*, 270 F.2d 425 (9th Cir. 1959).

Apruzzese, *The LMRDA and the Building and Construction Industry*, LMRDA Symposium, note 12, *supra*, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. *See* Fenton, *Union Hiring Halls: NLRB Rules, Penalties*, 42 L.R.R.M. 101, 103 (1958).

picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the construction industry were sufficiently disruptive of existing practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong. Rec. 111, [1954] U.S. Code Cong. & Admin. News 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted . . . under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S. Doc. 10, 86th Cong., 1st Sess.; 105 Cong. Rec. 1297; I Leg. Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time—that of limiting "hot cargo" agreements.

In June 1958, the Supreme Court had decided *Local 1976, United Brotherhood of Carpenters v. NLRB*, (*Sand Door*), 357 U.S. 93. *Sand Door* stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, *id.* at 107, *Sand*

Door was widely interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished the congressional purposes in various ways. The clearest accommodation to the peculiar conditions of the construction industry was found in § 8(f),[16] which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts to an exception to §§ 8(a)(1), (2) and 8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective

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[16]Section 8(f), 29 U.S.C. § 158(f), provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment, or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

bargaining agreement before the union represents a majority of employees in the unit. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961); *see NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 344-45 (1978). Section 8(f) also shortened to 7 days the period for non-union workers to join the union under the union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the *Sand Door* decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry proviso excepted agreements "relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work. . . ."

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[17]S. 1555, 1 Leg. Hist. 582.

[18]H.R. 8342 as amended by H.R. 8400, 1 Leg. Hist. 683.

[19]H.R. Rep. No. 1147 (Conference Report) 86th Cong., 1st Sess. 38-40; 1 Leg. Hist. 942-44 (1959).

[20]The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states:

> *Provided further*, That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. . . .

It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed at the construction site. Although the matter is not free from doubt, we believe that the legislative history favors the latter view.

(C) Legislative Discussion of the Construction Industry Proviso.

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong. Rec. 17899; II Leg. Hist. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements between a union and an employer by which

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[21]There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. *See, e.g.*, 105 Cong. Rec. 17381, II Leg. Hist. 1385 (Senators Javits and Goldwater); 105 Cong. Rec. 15538, II Leg. Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong. Rec. 15848; II Leg. Hist. 1680 (Rep. Teller).

the employer would boycott others. The Conference committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. . . . To the extent that such agreements are legal today under section 8(b)(4) . . ., the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39; I Leg. Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
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> . . .
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> *Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e).*
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> *It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.*

105 Cong. Rec. 17900; II Leg. Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary objectives, which meant that the holding of *Denver Building Trades, supra*, was left in effect. On the other hand, the Conference Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The *Sand Door* decision, *supra*, which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. *Operating Engineers Local Union No. 3 v. NLRB*, 266 F.2d 905 (D.C. Cir.), *cert. denied sub*

nom. St. Maurice v. NLRB, 361 U.S. 834 (1959).[22] While that case dealt with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement the Court referred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms complying with the terms of the prime employer's agreement. Lunden, *Subcontracting*

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[22]The *Engineers* decision was submitted to the House Committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.Rf. 4474 and Related Bills Regarding Labor-Management Reform Legislation, 803-07 (1959) (hereafter House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in *Engineers*, appeared before the Committee and testified as to the scope of the subcontracting clause:

> The Contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses (sic) says that any time an AGC contractor subcontracts work the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers local 3.
>
> Since about 1955, the AGC and the Operating Engineers *have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.*

5 House Hearings 2366 (Emphasis supplied).

Although the *Engineers* decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's attention. Senate Hearings 752 (Testimony of Sen. Curtis).

Clauses in Major Contracts, 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The survey canvasses various limitations appearing in subcontracting clauses in the construction industry, but makes no mention of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. *Id.* at 715-16. That there may not have been a consistent pattern of subcontractor agreements of the type in issue here is not crucial. What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) The Connell Decision.

It was against this industrial and legislative background that the Supreme Court decided *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). *Connell* was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees.

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[23]Office of the General Counsel, Memorandum 76-57, December 15, 1976, *reprinted in* Labor Relations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards clauses, the General Counsel found that study "inconclusive." *Id.* at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. *Id.* at 309.

The picketing was successful and the contractor sought to annul the ensuing agreement on the grounds that it violated the antitrust laws.[24] One of the defenses raised by the union was that the agreement could not be a violation of the antitrust laws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attack the subcontracting clauses in the present case argue that *Connell's* language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So interpreted, *Connell* would invalidate the agreements in issue here at least until the presence of

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[24]*Connell* was another chapter in the dispute in Dallas between building contractors and trade unions. In *Dallas Building & Construction Trades Council v. NLRB*, 396 F.2d 667 (D.C. Cir. 1968), a clause similar to the one in *Connell* was at issue. Unlike *Connell*, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days by § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the unions picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General Counsel refused to issue a complaint. *See Connell*, 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631-32 n.10.

When Local 100 began picketing *Connell*, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

union workers at a particular jobsite triggered their application. We concede at the outset that the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the *Connell* decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevailing thrust of *Connell* is to the contrary and favors a broader view of the exemption. Our conclusion is supported in particular by the *Connell* opinion's emphasis on the absence of a collective bargaining relationship, its references to legislative history, and its characterization of the interests served by the proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of *Connell* from the present case is that the agreements in *Connell* arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor

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[25]But for the *Connell* decision, we would have no difficulty in enforcing the Board's order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. *See, e.g., Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Suburban Title Center Inc. v. Rockford Building & Construction Trades Council*, 354 F.2d 1, 2-3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966) *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 48*, 190 N.L.R.B. 415, 416-17 (1971).

exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in *Connell*:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

421 U.S. at 626.[27] The focus of the *Connell* decision was therefore understandably upon the situation created by subcontracting clauses in the absence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of *Connell*, however. The parties themselves had framed the issues toward the same end. The union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-

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[26]*See Connell*, 421 U.S. at 622-23; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. *Connell, supra*, 622-23. *See generally*, R. Gorman, Basic Text on Labor Law, 621-31 (1976).

[27]The fact that *Connell* was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, *infra* p. .... , but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, of course, is frequently contrary to that of the antitrust laws. *See* St. Antoine, *supra*, n. 26.

bargaining relationship . . .," but not those involving a "stranger" contractor. *Id.* at 627.[28] The subject of controversy, then, was the validity of subcontractor agreements *outside* of the collective bargaining context, and the *Connell* opinion must to a large degree be read in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold that this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, . . . may be the basis of a federal anti-trust suit. . . .

Id. at 635. The holding of *Connell*, then, does not in the strict sense control the cases before us.

The *Connell* opinion did, however, discuss at length the reach of § 8(e) and its construction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language of *Connell* and apply it to the situation of the cases at bar where a collective bargaining

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[28]The briefs in *Connell* concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to *Connell*. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished in the *Connell* opinion as being ". . . addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10. (emphasis in original).

relationship existed between the unions and the contractors with whom the agreements were sought.[29]

A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of *Connell*, remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the *Connell* opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between union and nonunion workers there. These two themes — the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite — are interwoven in *Connell* as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer — contractor or subcontractor — is highly flexible and grows

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[29]In *Woelke*, the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during negotiation to renew the contract. In *Pacific Northwest*, the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in *Donald Shriver Inc. v. NLRB*, Nos. 78-2177 and 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As Congress recognized in passing § 8(f), collective bargaining cannot even await the presence of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand, the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. *National Woodwork, supra,* at 644-45;

National Maritime Union, supra. We do not quarrel with this well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. *NRLB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 689 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside of the construction industry pursue secondary objectives.

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the *Connell* situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in *Connell* disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that *one* of these characteristics is that union workers are traditionally

hostile to the presence of nonunion workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements lead to multiple employers hiring a few workers for short periods of time,[30] and where working conditions applicable to one set of workers may very well affect others working on the same project.[31]

We believe that the *Connell* opinion is sensitive both to the interconnection of interests between employees of the

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[30]The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the average, each firm employed six construction workers. U.S. Bureau of the Census, Census of Construction Industries (1977), *cited in* Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.
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> . . .
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> [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, *The Building Trades and Title VII of LMRDA*, in LMRDA Symposium, *supra*, note 12, at 1034, 1043.

[31]*See Donald Schriver Inc., supra*, slip op. at 43-46.

various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in *Connell* points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628-29. The legislative history discussed above indicates, we believe, that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in *Connell* dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that *Connell* was dealing with a case not considered by Congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the *Connell* opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to overrule" *Denver Building Trades*, 421 U.S. at 629. *Denver Building Trades* had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The *Connell* opinion refers to congressional discussion of special problems in the construction industry related both to the §

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[32]In *Connell*, the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in *Operating Engineers*, *supra*, as well as the House and Senate Hearings, *supra*, note 24, suggest that Congress was well aware of the existence of these clauses.

8(e) proviso and to the attempt to overrule *Denver Building Trades*. That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secondary boycott ban is based upon the concept of two employers — a primary and a secondary employer. The theory is that a neutral employer should not be compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
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> The case of the building and construction industry represented probably the most flagrant injustice, where

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[33]Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong. Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231, (Project Engineering Co.,)*, 75 F. Supp. 672 (S.D.N.Y. 1948).

> a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations. He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong. Rec. 17880-81; II Leg. Hist. at 1425. Even where the sources cited by *Connell* deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the members in secondary employ. The memorandum by representatives Thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obstruct their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
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> . . . [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong. Rec. 15541; II Leg. Hist. 1577. These materials cited by the *Connell* Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The *Connell* opinion quotes *National Woodwork Manufacturers, supra,* to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at 630, quoting 386 U.S. at 638-39. It is clear that the *Connell* opinion views the jobsite considerations of *National Woodwork* as going well beyond the problem of friction among workers,[34] because *Connell* next refers to some courts that have suggested that the proviso serves an "even narrower function" — the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* at 630, quoting *Drivers Local Union No. 695 v.*

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[34]Indeed, *National Woodwork* contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32. That footnote refers to *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 Yale L.J. 673, 684-89 (1951), which discusses not only jobsite friction but also the additional considerations of interchangeability of workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employers at the jobsite.

NLRB, 361 F.2d 547, 553 (D.C. Cir. 1966). The *Connell* opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the *Connell* case the union did not purport to represent *any* of the interests served by the proviso. 421 U.S. at 631.[35]

We believe that it would do some violence to the language of the *Connell* opinion to adopt the "even narrower" view of the construction industry proviso which the Court in *Connell* did not represent to be its own. Yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-to-shoulder jobsite friction can occur. Instead, we think that it is more in accord with the language of *Connell* to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite.

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[35]Essentially the same situation was dealt with by this court in *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975). *ACCO* does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read that as essential to its decision. *ACCO* was written before *Connell* and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interests" which are emphasized in *National Woodwork*, *Connell*, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

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[36]Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the *Connell* Court stated:

> [W]e think its authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that

may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that *Connell* does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) Practical Consequences.

Our reading of *Connell* to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it is supported by the severe practical limitations attending a contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. If unions are confined to negotiating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of subcontract-

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[37]Our reading of the quoted language in *Connell* as presenting disjunctive alternatives rather than conjunctive and cumulative requirements is supported by the District of Columbia Circuit and probably by the Third Circuit. *Donald Schriver, Inc., supra; Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*, 609 F.2d 1368, 1374-75 (3d Cir. 1979) (en banc). Lower courts and commentators have varied in their approach to the underlying issue. *See Landscape Specialties, Inc. v. Laborers' International Union, Local 806*, 477 F. Supp. 17 (C.D. Cal. 1979); *Long v. Floorcraft Carpet Co.*, 82 Labor cases ¶ 10,044 (D. Or. 1977); St. Antoine, *supra*, 62 Va. L. Rev. at 619; Janofsky & Hay, *Connell — Consistent with Past, Indicative of Future*, Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursuing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

ing agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted that the appearance of any union worker on the job triggers subcontracting agreements covering the entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are within the proviso of § 8(e). First, there are overwhelming practical difficulties in confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, the legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining

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[38]The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We believe that it is a more manageable task, however, to police jobsites to ensure that subcontractors working there have agreements with the policing union than it is to determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

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agreements. Third, the *Connell* decision, which admittedly has language that might point to either result, may fairly be read to support the validity of subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true that the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.
ADDITIONAL ISSUES.

It is contended by AGC that even if the construction industry proviso authorizes clauses requiring subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union" subcontractor agreement in a decision that was submitted to the House com-

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[39] *NLRB v Yeshiva University*, 444 U.S. 672, 691 (1980). *Compare Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978), *and NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350-51 (1978), *with NLRB v. International Longshoremen's Association*, 100 S. Ct. 2305 (1980).

[40] *See International Union of Operating Engineers, Locals 542, 542-A and 542-B, (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977); General Counsel Memorandum, note 25, *supra*.

mittee considering the 1959 amendments. *Operating Engineers Local Union No. 3 v. NLRB, supra;* 2 House Hearings 803-07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia Circuit in *Donald Shriver, Inc. v. NLRB, supra,* slip op. at 52-5. We also note that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The actual wording of § 8(b)(4)(ii)(A), however, prohibits coercion of any person "*to enter into any agreement which is prohibited by* [§ 8(e)]."[42] The negative implication of this provision is

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[41]Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong. Rec. 18128; II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong. Rec. 17900, II Leg. Hist. 1433.

Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, *see* 105 Cong. Rec. 15516, II Leg. Hist. 1552 (statement of Rep. Madden), said that the question was left open for the courts to decide. 105 Cong. Rec. 19772, II Leg. Hist. 1858.

[42](Emphasis supplied). Section 8(b)(4)(ii)(A) appears *supra* note 4.

surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the Board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. *Construction Production & Maintenance Laborers Union, Local 383 v. NLRB, (Colson & Stevens Construction Co.)* 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964). The Board subsequently acquiesced in the courts' view. *Northeastern Indiana Building & Construction Council*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuant to the grievance procedure.[43] The Board concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments

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[43] *See* note 1, *supra*.

exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history makes clear Congress's intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 163-64 *9th Cir. 1968, cert. denied*, 395 U.S. 921 (1969). We have also held that such clauses may be enforced by arbitration. *La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitration award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agree-

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[44]The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the *Sand Door* case *Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. *See also*, 105 Cong. Rec. 17900, II Leg. Hist. 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it. . . ." 105 Cong. Rec. A8359, II Leg. Hist. 1830.

ment to mean what it says. *Operating Engineers, Local No. 701 v. NLRB*, 578 F.2d 841, 842 (9th Cir. 1978); *Donald Schriver, Inc. v. NLRB, supra*, slip op. at 57-58.

VII.
CONCLUSION.

We find that provisions in a collective bargaining agreement forbidding the signatory employer to subcontract work at a construction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employers to enter such agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently invalid. We accordingly enforce the orders of the Board in their entirety.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. - Nos. 78-3469, 78-3487, 78-3619, 78-3468, 79-7011

SNEED, Circuit Judge,(with whom CHOY, ANDERSON and FARRIS, Circuit Judges, concur) dissenting:

As with many legal issues, where one ends up in this case depends upon were one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry proviso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches its conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting point, on the other hand, is with *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and its concern with the "top-down organizing" effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. *Id.* at 1348-50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme Court in *Connell*. .... F.2d .... (p. 26 majority opinion). Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, is said not to have been a concern of the Supreme Court in *Connell* because in that case "the union did not purport to represent *any* of the interests served by the proviso." .... F.2d .... (p. 26). Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in *Connell* is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more empathetic with *Connell*'s concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc

court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union standards governing wages and working conditions, was more efficient than its competitors.

It must be acknowledged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-46 (1967); *see also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Johnson*, 368 F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrim-

ination by employers." .... F.2d .... (p. 29). I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legistlative history of the proviso. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975). In surveying the legislative history, we conclude that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. *Id.* at 851; *accord, Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966); *Essex County District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *International Union of Operating Engineers, Locals 542, 542-A and 542-B*, 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). I see no reason to depart from our earlier analysis of the purpose of the proviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong. Rec. 19785-86, 19809 (1959); II Leg. Hist. 1815-16 (extension of remarks of Senator McNamara and Representative Thompson); *contra* 105 Cong. Rec. 20004-05 (1959); II Leg. Hist. 1861 (extension remarks of Rep-

resentative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As *Connell* and *ACCO* concluded, the legislative history supports the conclusion that most congressman thought the proviso was intended to address the problem of jobsite friction. *See, e.g.*, I Leg. Hist. 82 (message from President Eisenhower to Congress); 105 Cong. Rec. 15852, II Leg. Hist 1684 (statement of Congressman Goodell); 105 Cong. Rec. 17333-34, II Leg. Hist. 1383-84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, it too strongly supports the conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong. Rec. 15541 (1959); II Leg. Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those challenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect broad subcontractor clauses. I believe this reasoning gives far too much weight to the bare reference to the pattern of collective bargaining referred to in the Committee Report. *See Connell, supra*, 421 U.S. at 628-29. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That limitation at least partially overruled the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather

than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). *Connell, supra,* 421 U.S. at 632-33. The holding of the panel gets my nod.[1]

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[1]Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help clause in the AGC contract is invalid.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al. — Nos. 78-3469, 78-3619, 78-3468, 79-7011.

FARRIS, Circuit Judge, with whom Judge Choy and Judge Anderson join, dissenting:

I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to non-signatory contractors. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . ." *Id.* The precise issue here is whether that proviso legalizes agreements that limit subcontracting at sites where the employer has no employees represented by the union. The majority holds that it does. I disagree.

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id.* at 633.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a collective bargaining agreement to restrict an employer's subcontracting at the jobsite where it employs the union's members. The majority asserts that another purpose—maintenance of contract standards in the industry—requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. *See also Donald Shriver, Inc. v. NLRB*, No. 78-2177, slip op. at 43-47 & n.29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are related. It is not sufficient that the restraint serves the interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. *See generally* Archibald Cox, Derek Bok & Robert

Gorman, *Cases and Materials on Labor Law* 892-95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

APPENDIX B.

Opinion.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner, v. National Labor Relations Board, Respondent.

Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., Petitioner, v. National Labor Relations Board, Respondent.

International Union of Operating Engineers, Local No. 701, Petitioner, v. National Labor Relations Board, Respondent.

Woelke & Romero Framing, Inc., Petitioner, v. National Labor Relations Board, Respondent, and Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Intervenors.

National Labor Relations Board, Petitioner, v. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondents. Nos. 78-3469, 78-3487, 78-3619, 78-3468 and 79-7011.

United States Court of Appeals, Ninth Circuit. Dec. 26, 1979.

On Petition for Review of the Order of the National Labor Relations Board.

Before SNEED and KENNEDY, Circuit Judges, and EAST* District Judge.

SNEED, Circuit Judge:

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Construction contractors challenge in these cases the legality of a provision in a collective bargaining agreement which prohibits a signatory contractor from assigning work to subcontractors unless the subcontractors have a collective bargaining agreement with the signatory union. The National Labor Relations Board has ruled that such a provision does not violate the prohibition in the National Labor Relations Act (the Act) against "hot cargo" agreements[1].

In deciding these cases we must determine the scope of the Supreme Court's holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). We hold that under *Connell* the clauses before us are not lawful under section 8(e) of the Act, 29 U.S.C. § 158(e) (1976), and are not within the construction industry proviso of section 8(e).

Our jurisdiction rests on 29 U.S.C. § 160(e) and (f) (1976).

I.
FACTUAL BACKGROUND

Two decisions of the Board are before us for review. The first considered the legality of a collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), which is an association of approximately 200 employers engaged in construction in Oregon and southwest Washington, and the International Union of Operating Engineers, Local 701 (Engineers). The agreement, effective from June 1, 1975 through May 31, 1980, contains a provision precluding

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[1]A hot cargo provision, so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials—or, as in this case, the services—of nonunion employers.

AGC employers from assigning jobsite work covered by the agreement to any subcontractor which does not have a current labor agreement with Engineers.[2] Another provision makes violations of the agreement subject to a grievance and arbitration procedure, and the results of arbitration are enforceable by "such action as they [the parties] deem necessary . . ." This article would thus permit enforcement of the agreement, including the subcontractor clause, through strikes or picketing.

Following a charge filed by another association of construction employers, the General Counsel of the NLRB issued a complaint alleging that the agreement's subcontractor clause and enforcement provision violate section 8(e) of the Act.[3] The case was heard by the Board upon stipulated facts and it held that, while the subcontractor clause fell within the general proscription of section 8(e), the clause was protected by the section's construction industry proviso. However, the Board invalidated the self-help enforcement

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[2]The subcontractor clause provides in pertinent part as follows:

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

[3]Section 8(e) provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

29 U.S.C. § 158(e) (1976).

provision insofar as it authorized economic sanctions in support of the subcontractor clause. All parties petitioned this court for review and modification of the Board's order. The Board, of course, seeks enforcement of its order.

The second decision of the Board which we review considered challenges to a proposed collective bargaining agreement which locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), sought to establish with Woelke & Romero Framing, Inc. (Woelke), a framing subcontractor who has performed work for various construction contractors in southern California. Between 1974 and 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, and, beginning on June 3, 1977, Woelke commenced negotiations with Carpenters concerning a successor arrangement. Two provisions of the proposed new agreement generated contention. One of these provisions forbade Woelke to subcontract jobsite work except with firms having a current labor agreement with Carpenters.[4] The second provision included foremen within the

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The proposed agreement also contains an alternative subcontractor clause, applicable in the event that the principal clause should be invalidated, which would prevent subcontracting with any firm unless the firm's employees belong to a union and unless the subcontractor agrees to comply with the full terms of the labor agreement between Woelke and Carpenters. We accept the Board's conclusion that the alternative provision is merely a disguised union signatory clause, since in practice only a subcontractor affiliated with Carpenters could satisfy its requirements, some of which are unrelated to any legitimate primary interest of the bargaining employees.

unit of employees whom Carpenters would represent. According to the parties' stipulations, foremen function as supervisors and also as Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances. Impasse over these provisions led to the termination of negotiations on August 4, 1977. Thereafter, Carpenters picketed Woelke at four jobsites. As a consequence of this picketing, employees of the subcontractors of general contractors at two of the jobsites refused to work.

Upon charges filed by Woelke, the General Counsel of the NRLB issued a complaint against Carpenters. After hearing the case upon stipulated facts, the Board decided that the proposed subcontractor clause was protected by the construction industry proviso. It follows, the Board held, that picketing by Carpenters did not violate the probibition in section 8(b)(4)(i) and (ii)(A) of the Act, 29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).[5] Before reaching this conclusion the Board held that but for the construction industry proviso the proposed subcontractor clauses would violate section 8(e).

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[5]Section 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> * * * * * *
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .

29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).

In addition, the Board concluded that bargaining to impasse and picketing intended to compel the unionization of Woelke foremen constituted a violation of section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B) (1976),[6] and ordered Carpenters to desist from this practice.

The Board requests enforcement of this order. Woelke seeks reversal of the Board's decision with respect to the subcontractor clause.

We shall discuss first the critical issue of these cases, *viz.* the scope of the construction industry proviso as applied to the subcontractor clauses involved in each case. Thereafter the remaining issues pertinent to each case will be addressed.

II.
SCOPE OF THE CONSTRUCTION INDUSTRY PROVISO.

Our analysis will proceed as did that of the Board. That is, we shall initially determine whether these clauses fall within the general proscription of section 8(e) and, inasmuch as we agree with the Board's conclusions that section 8(e) does proscribe these clauses, we shall then determine whether the clauses are, nonetheless, protected by the construction industry proviso. As already indicated, our conclusion with respect to the scope of the proviso differs from that of the Board.

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[6]Section 8(b)(1)(B) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . .

29 U.S.C. § 158(b)(1)(B) (1976).

A. *Does Section 8(e) Proscribe These Clauses?*

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. Reading section 8(e) literally there is no doubt but that section 8(e) proscribes such clauses. The problem is not that simple, however. In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967), the Supreme Court read into section 8(e) a distinction between primary and secondary objectives. An agreement which advances only primary objectives of the bargaining employees, such as preserving work opportunities, is not unlawful. Thus, a court must consider:

> . . . whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] . . . would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

Id. at 644-45, 87 S.Ct. at 1268, 1269 (citations omitted).

Applying this standard, this court has recognized that a union signatory clause—as opposed to a union or area standards clause, which merely requires that the employees of subcontractors work under the same terms and conditions

as those enjoyed by union members—is normally secondary in nature. *Griffith Co. v. NLRB*, 545 F.2d 1194, 1199 (9th Cir. 1976), *cert. denied*, 434 U.S. 854, 98 S.Ct. 171, 54 L.Ed.2d 125 (1977). As the Second Circuit observed in *NLRB v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974): "If the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units."

Nor can these clauses be regarded as valid work preservation provisions. They do not assure work opportunities for employees in the respective work units, i.e., employees of AGC or of Woelke; rather, they operate for the general benefit of the respective unions. Hence, neither provision is directed to "the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturers*, 386 U.S. at 645, 87 S.Ct. at 1268, 1269. We agree with the Board, therefore, that the subcontractor clauses fall within the general prohibition of section 8(e).

B. *Does the Construction Industry Proviso Authorize These Clauses?*

1. *The Interpretation Required by Connell Construction Co.*

In determining whether these subcontractor clauses are protected by the construction industry proviso, we encounter the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). There the union, as a result of picketing, had obtained a subcontractor agreement with a general building contractor even though the union did not represent or seek to represent the contractor's own employees. When the contractor challenged the agreement under the Sherman Act, the union defended, in part, by arguing that the agree-

ment was expressly authorized by the construction industry proviso. Declaring that "[section] 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment," *id.* at 628, 95 S.Ct. at 1838, the Supreme Court observed that the section was part of a program enacted to limit "top-down" organizing campaigns. The construction industry proviso, though an exception to the section's general proscription, should be construed so as not to undermine that objective. *Id.* at 628-33, 95 S.Ct. 1830. The Court concluded that the subcontractor clause in that case was not covered by the proviso. It expressed its holding in the following manner:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

Id. at 635, 95 S.Ct. at 1841.

The Board in the cases here being reviewed emphasized heavily the Supreme Court's reliance on the absence of a collective bargaining relationship. Where this relationship exists it held union signatory clauses were within the construction industry proviso. The Board stated:

> "The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective bargaining relationship, and possibly without such a relationship if the clauses are aimed at avoiding the Denver Building Trades [*NLRB v. Denver Building Trades*, 341 U.S.

675 [71 S.Ct. 943, 95 L.Ed. 1284] (1951)] problems."[7]

We disagree. We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite his employees who are members of the signatory union, and does not engage subcontractors whose employees are members of the signatory union, can engage nonunion subcontractors to perform work on that particular jobsite that otherwise would be done by members of the signatory union. To do so would not, in our opinion, violate a valid union signatory clause. To hold otherwise extends the construction industry proviso beyond the limits we attribute to *Connell*.

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[7]The unions and the Board purport to find support for this interpretation of *Connell* in *California Dump Truck Owners Ass'n v. Associated General Contractors of America*, 562 F.2d 607 (9th Cir. 1977). Declining to find challenged provisions of a labor agreement unlawful under the antitrust statutes, this court in *Dump Truck* distinguished *Connell* with the observation that in *Connell* no collective bargaining relationship had existed. *Id.* at 613. However, *Dump Truck* did not involve interpretation of section 8(e), and its quotation from *Connell* was taken from a section of the *Connell* opinion which was not concerned with section 8(e). Moreover, the provision challenged in *Dump Truck* was not a union signatory clause; the provision did not prohibit employers from using nonunion subcontractors but merely required that such subcontractors receive a rate of pay not less than that of union employees, and that the union be notified when a nonunion subcontractor was employed. *Id.*

We are not aware, moreover, of any decision of any other court of appeals which has read *Connell* as construing the construction industry proviso so as to protect all subcontractor agreements made in a collective bargaining context. The district courts which have considered the question have reached contrary conclusions. *Compare, e.g., Long v. Floorcraft Carpet Co.*, 82 Labor Cases ¶ 10,044, p. 16,151 (D.Ore.1977), *with In re Bullard Contracting Corp.*, 464 F.Supp. 312 (W.D.N.Y.1979).

Our holding recognizes the validity of a provision in a collective bargaining agreement that with respect to any particular jobsite will preclude the possibility of members of the signatory union being required to share work with nonunion workers. Under a provision of this sort the employment of one member of the signatory union on the jobsite assures that all relevant work on that jobsite will be done by signatory union members. We believe this is a more accurate reading of *Connell's* holding than that of the Board.

We acknowledge that the teaching of *Connell*, as applied to the issue we are considering, is not unambiguous. The Court stated that the construction industry proviso applies only to work performed at the jobsite and then added, quoting *Drivers Local 695 v. NLRB*, 124 U.S.App.D.C. 93, 99, 361 F.2d 547, 553 (D.C.Cir.1966), that some courts had assigned the proviso the "even narrower function" of alleviating " 'the frictions that may arise when union men work continuously alongside nonunion men on the same construction site.' " *Connell*, 421 U.S. at 630, 95 S.Ct. at 1839. The Court's statement left open this "even narrower" view of the proviso's scope. However, since the subcontractor agreement in *Connell* occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What *Connell* left unanswered we must confront and answer.

2. *Reasons In Support of Our Holding.*

We believe our response is supported by the proviso's background and statutory setting. Section 8(e) was enacted as part of the Labor-Management Reporting and Disclosure Act of 1959. The section was designed, as the Supreme Court noted in *Connell*, to strengthen the prohibition in

section 8(b)(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. *Id.* at 628, 95 S.Ct. 1830. However, the prohibition in section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and the more limited exception for the construction industry.

The unions and the Board contend that, at least with respect to agreements made within the context of collective bargaining, the proviso should be given the expansive scope which its literal terms suggest. Their argument can be stated syllogistically: At the time the proviso was enacted, the union signatory subcontractor provisions were lawful. The proviso was intended to preserve in the construction industry the law as it then existed. Hence, the proviso was intended, and should be construed, to protect subcontractor provisions.

The difficulty with this argument is that neither of the premises can be accepted without qualification. In 1959, when section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined. *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2d 1186 (1958), the so-called *Sand Door* case which in the unions' view defined the state of the law at that time, involved an agreement forbidding the use of nonunion material, not a subcontractor provision. Moreover, the issue in *Sand Door* was whether union picketing and coercion designed to enforce a hot cargo provision was unlawful under section 8(b)(4), and the Court, although it indicated that a hot cargo clause was not *prima facie* evidence of illegal coercion under section 8(b)(4), *id.* at 108, expressly declined to consider "the invalidity of hot cargo provisions

as such." *Id.* at 107, 78 S.Ct. at 1020. Thus, the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door*.

Furthermore, even if subcontractor clauses were lawful prior to the passage of the Labor-Management Reporting and Disclosure Act, it is unclear to what extent the construction industry proviso was intended to preserve the then current law. The unions rely upon statements made by Senator Kennedy and an extract from the Conference Report which suggest that the proviso would not change the law of the *Sand Door* decision. Yet in explicitly limiting the proviso's protection to jobsite work, Congress adopted a restriction which was never mentioned in *Sand Door*. Indeed, in the same paragraph which indicates that the law of *Sand Door* would be preserved, the Conference Report states that the proviso would not protect "agreements relating to supplies or other products or materials . . . delivered on the site of the construction," which was precisely the kind of agreement at issue, and allegedly declared to be lawful, in *Sand Door* H.R.Rep.No. 1147, 86th Cong., 1st Sess. 39, U.S.Code Cong. & Admin.News 1959, pp. 2318, 2511, *reprinted in* I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 943 (1959). Hence, the broad assertion that the construction industry proviso was designed to leave the law unchanged is inaccurate. Congress may have intended to preserve existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is.

We must, therefore, look to the purpose Congress sought to serve by enacting an exception for the construction industry. In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), this court surveyed the legislative history of section 8(e) and concluded:

> Although the legislative history of the proviso is oftentimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, "the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site." *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 124 U.S.App.D.C. 93, 361 F.2d 547, 533 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen.

The court's conclusion in *ACCO* is consistent with the Supreme Court's reasoning in *Connell*. *Connell* noted that the construction industry proviso resulted from efforts to overrule the holding of *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), in which the Supreme Court had ruled that union picketing which was intended to force a general construction contractor to terminate its contract with a nonunion subcontractor violated section 8(b)(4). *Connell*, 421 U.S. at 629, 95 S.Ct. 1830. The *Denver Building Trades* decision was objectionable because, as Justice Douglas had argued in dissent, "[a]ll the union asked was that union men not be compelled to work *alongside nonunion men on the same job*." *Denver Building Trades*, 341 U.S. at 692, 71 S.Ct. at 953 (emphasis added). Thus, the purpose of the proviso was to permit unions and construction employers to avoid the tension and discontent that exists when members of a

union are required to work on the same jobsite with nonunion workers of the same craft or trade.[8] Our holding permits the avoidance of precisely that source of tension and discontent.

We cannot extend the proviso's protection beyond the purpose for which the exemption was created without creating a shield of immunity for agreements which we believe Congress wished to prohibit. Hence, the purpose of the exception dictates its scope. A subcontractor clause is a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of jobsite friction between union and nonunion employees of a particular craft or trade does not arise. Indeed, a general contractor that assigns no employees who are members of the signatory union to a particular construc-

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[8]The employer petitioners argue further that the proviso was not intended to protect *particular union* clauses, i.e., agreements which require that an employer's subcontractors belong not merely to a union, but to the union which is party to the labor agreement containing the subcontractor proviso. This interpretation is based upon several statements by Senators indicating that the proviso would protect agreements precluding the use of "nonunion" (or, in a single instance, "unorganized") subcontractors. The employer petitioners interpret the term "nonunion" to refer only to firms not belonging to any union, and then make the negative inference that the proviso does not protect subcontractor clauses forbidding the use of firms which, though not associated with the signatory union, are not "nonunion" firms in this narrow sense. This inference is dubious at best and, in any event, the fragments of legislative history upon which these parties rely do not constitute conclusive evidence of the understanding of Congress as a whole. Moreover, this view of the exception would frustrate the purpose of the proviso, because jobsite friction might arise between members of competing unions as well as between union and nonunion workers. We therefore decline to take this restrictive view of the proviso's scope.

tion project occupies the same position, with respect to that project and the signatory union, as the contractor in *Connell* which had no union employees at all. The fact that a contractor may employ signatory union personnel elsewhere is, for purposes of the proviso, irrelevant.

We find additional support for our interpretation of the construction industry exception in the proviso's statutory setting. Section 7 of the Act, 29 U.S.C. § 157, provides, with limited exceptions, that employees have the right to refrain from any or all union activities. In addition, if employees choose to unionize, they have the right to bargain "through representatives of their own choosing . . ." Although section 8(f) of the Act, 29 U.S.C. § 158(f), permits "pre-hire" labor agreements in the construction industry, that section does not override the workers' rights of self-determination. *Connell*, 421 U.S. at 632, 95 S.Ct. 1830. A union signatory subcontractor clause operates to force nonunion firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. The agreement between AGC and Engineers, for instance, forecloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such a provision is manifest. The clause is thus precisely the kind of instrument for "top-down" organizing which the Supreme Court condemned in *Connell*. *Id.* at 631, 632, 95 S.Ct. 1830. For those reasons, we believe that the position taken by the Board, which legitimates the use of such an organizing weapon by a union as long as the union has a collective bargaining relationship with the signatory employer, is improper.

III.
REMAINING ISSUES.

Having decided the principal issue raised by these cases, we now consider the proper disposition of each of the cases before us.

For the reasons elaborated in the preceding section, the subcontractor clause contained in the collective bargaining agreement between AGC and Engineers constitutes a violation of section 8(e). The clause in its present form, as section 8(e) provides, is unenforceable. Hence, we need not decide whether the agreement's self-help enforcement provision as applied to a lawful subcontractor clause would violate section 8(e).

The subcontractor provision proposed by Carpenters in negotiations with Woelke is also unlawful under section 8(e). Picketing engaged in by Carpenters in order to compel Woelke to accept the provision was thus a violation of section 8(b)(4)(i) and (ii)(A), and should have been enjoined by the Board. The Board's order is accordingly modified to enjoin Carpenters from picketing or using economic coercion for the purpose of inducing Woelke to enter into any agreement which contains such a provision. Our disposition of this issue makes it unnecessary to consider Woelke's additional contention that picketing intended to compel acceptance even of a lawful subcontractor clause is prohibited by section 8(b)(4)(i) and (ii)(A).

The Board requests enforcement of its order enjoining the use by Carpenters of picketing, strikes, or other coercion in order to compel Woelke to include within the bargaining unit foreman who are supervisors or Woelke's representatives for purposes of collective bargaining or the adjustment of grievances. Carpenters has not contested the Board's ruling that picketing or coercion used for this purpose con-

stitutes a violation of section 8(b)(1)(B) of the Act. The Board's order with respect to this issue should be enforced.

The Board shall modify its orders in these cases to conform to the views expressed in this opinion, and those orders, as modified, are ordered enforced.

Enforced As Modified.

APPENDIX C.

Decision and Order.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* Woelke & Romero Framing, Inc. Cases 21-CB-6196 and 21-CC-1922.

November 13, 1978

Upon charges filed by Woelke & Romero Framing, Inc. (herein called Woelke or Charging Party), on August 11, 1977,[1] and duly served on Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein collectively called Respondents), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 21, on September 23, issued and served on Respondents an order consolidating cases, consolidated complaint, and notice of hearing. The complaint alleged that Respondents (1) violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act, as amended, by, among other acts, picketing Woelke at various jobsites in southern California with an object of forcing Woelke to enter into an agreement prohibited by Section 8(e) of the Act, and (2) violated Section 8(b)(1)(B) of the Act by, among other acts, bargaining to impasse and striking Woelke with an object of forcing Woelke to include within the bargaining unit of employees represented by Respondents foremen of Woelke who are supervisors within the meaning of Section 2(11) of the Act and Woelke's selected representatives for purposes of collective bargaining or ad-

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[1]Unless otherwise indicated, all dates are in 1977.

justment of grievances within the meaning of Section 8(b)(1)(B) of the Act. On October 3 Respondents filed, and duly served on Woelke and the General Counsel, their answer to the consolidated complaint in which they denied the commission of any unfair labor practices.

Thereafter, on October 19, Respondents, Woelke, and counsel for the General Counsel entered into a stipulation of facts and a motion to transfer the proceedings to the Board wherein they agreed that the charges, the order consolidating cases, consolidated complaint, and notice of hearing, the answer to complaint, and the stipulation of facts, including the exhibits attached thereto, shall constitute the entire record herein and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waive a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision and desire to submit these cases for findings of fact, conclusions of law, and Order directly by the Board. The parties, however, expressly limited the stipulation of facts for the purposes of this proceeding only. In addition, the parties reserved the right to object to the relevancy, materiality, or competency of any of the facts stated in the stipulation.

On December 13 the Board issued an order approving the stipulation and transferring the proceeding to the Board and set a date for the filing of briefs. Thereafter, Respondents, Charging Party, and General Counsel filed briefs in support of their respective positions. In addition, briefs *amici curiae* were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations, the Building and

Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America.[2]

Pursuant to a notice of hearing issued by the Board on February 8, 1978, oral argument in this and related proceedings[3] was held before the Board in Washington, D.C., on February 23, 1978. In addition to arguments presented by the parties involved in the several proceedings, permission to argue orally as *amici curiae* was granted to the Chamber of Commerce of the United States of America, the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Laborers' International Union of North America, AFL-CIO.

The Board has considered the entire record herein as stipulated by the parties, as well as the briefs filed by the parties and the *amici curiae* and the oral arguments made to the Board, and hereby makes the following findings and conclusions:

I. THE BUSINESS OF THE EMPLOYERS

Woelke, as described more fully below, is a framing subcontractor in the building and construction industry in southern California which, at relevant times, had subcontracts with the following subcontractors:

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[2]Although the Chamber's brief is directed principally to 239 NLRB 264 it is also addressed to the issues posed in this proceeding.

[3]*Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 NLRB 253 (1978); *Los Angeles Buiding and Construction Trades Council*; and *Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan—Kelley & Associates)*, 239 NLRB 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 NLRB 274 (1978).

Vanguard Builders, Inc., herein called Vanguard, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in southern California as a general contractor. At all times material herein, Vanguard has been engaged as the general contractor on construction projects located at Columbia and Main Streets, Riverside, California, herein called the Columbia jobsite, and at Lynwood and Rockford Avenue, San Barnardino, California, herein called the Rockford jobsite.

Birth Development Company, Inc., herein called Birth, is now, and at all times material herein has been, a corportion engaged in the building and construction industry in southern California in the construction and sale of single-family residences. At all times material herein, Birth has been engaged in the construction of a single-family residence tract located at Alessandro Boulevard and Via Vista in Riverside, California, herein called the Alessandro jobsite.

Woodhaven Developers, Inc., d/b/a Woodhaven Enterprises, herein called Woodhaven, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in southern California as a general contractor. At all times material herein, Woodhaven has been engaged as the general contractor in the construction of a single-family residence tract located at Lincoln and Mary Streets in Riverside, California, herein called the Lincoln jobsite.

Woelke, with a place of business located in San Bernardino, California, is engaged in the building and construction industry in southern California, specializing in framing. As stated, at all times material herein, Woelke has been engaged, pursuant to subcontracts with Vanguard, Birth, and Woodhaven, in performing framing work at the Rockford

and Columbia jobsites, at the Alessandro jobsite, and at the Lincoln jobsite, respectively. During the normal course and conduct of its business operations described above, Woelke annually purchases and receives goods and products valued in excess of $50,000 from suppliers located within the State of California, each of which purchases and receives said goods directly from suppliers located outside the State of California. The parties stipulated, and we find, that Woelke is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and a person engaged in commerce and in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act. The parties further stipulated, and we find, that Vanguard, Birth, and Woodhaven are, and each of them is, and have been at all times material herein, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Respondents are, and each of them is, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues.*

1. Are the subcontracting provisions in Respondents' contract proposal proscribed by Section 8(e) of the Act so as to render Respondent's picketing of Woelke to obtain these proposals violative of Section 8(b)(4)(i) and (ii)(A) of the Act?

2. Did Respondents violate Section 8(b)(1)(B) of the Act by bargaining to impasse with and striking Woelke over the inclusion of foremen within the collective-bargaining unit, when such foremen are supervisors within the meaning of Section 2(11) of the Act and the selected representatives of Woelke for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1) of the Act?

B. *The Stipulated Facts.*

As stated, Woelke at all times material herein has been engaged as a framing contractor in southern California, performing work under subcontracts for Vanguard at the Columbia and Rockford jobsites, Birth at the Alessandro jobsite, and Woodhaven at the Lincoln jobsite. At no times material herein have Respondents, or either of them, been engaged in a labor dispute with Vanguard, Birth, or Woodhaven, or any of their subcontractors other than Woelke. At all times material herein, Respondents, and each of them, have been engaged in a labor dispute with Woelke.

Woelke has been party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions, including Respondents, in the 11 southern California counties since July 5, 1974, by virtue of the execution on that date of a memorandum of agreement with Respondent Local No. 944. The memorandum of agreement, which by its terms was due to expire on or about June 15, 1977, provided *inter alia*, that Woelke would be bound by the 1974-77 Master Labor Agreement (herein called the 1974 MLA) of the Carpenters Union when the 1974 MLA was agreed to by the Carpenters Union and the various contractor associations which negotiated the MLA. On July 27, 1974, the Carpenters Union and the various contractor associations

agreed to the 1974 MLA. Consequently, Respondents and Woelke have been party to the 1974 MLA since that time. The 1974 MLA contained a union recognition clause and certain other clauses which, in effect, obligated Woelke to recognize the Carpenters Union and Respondents as the collective-bargaining representative of Woelke's employees, including those foremen to whom Woelke had given supervisory and grievance adjustment authority.[4] That agreement also contained, in article I, paragraph 103, subcontracting provisions similar to those involved here, set out *infra*[5]

From on or about June 3 to on or about August 4, 1977, Respondents, through their agent, Joseph Eickholt,[6] pursuant to notice, engaged in six collective-bargaining sessions with Woelke for the purpose of negotiating a successor collective-bargaining agreement. On or about August 4 Respondents and Woelke agreed that further negotiations should be postponed indefinitely, since Respondent and Woelke agreed that they had reached impasse over various proposals of Respondents. Among the issues which resulted in the impasse was Respondents' demand for, and Woelke's refusal to agree to, a proposal to include within the unit of

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[4]Art II—union recognition—sec. 201 reads:

> The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. . . . Employees and persons employed to perform work covered by this Agreement specially include Craft Foreman. A superintendent shall not use working tools.

[5]The validity of the subcontracting clauses in the 1974 MLA is raised in *Los Angeles Building and Construction Trades Council; and Local Union No. 1497, Carpenters (Donald Schriver, Inc.), supra*, issued this day.

[6]The parties stipulated that Joseph Eickholt has been and is now a representative of Respondents, acting on their behalf, and at all material times has been, and is now, an agent of Respondents within the meaning of Sec. 2(13) of the Act.

employees whom Respondents will represent for purposes of collective bargaining foremen of Woelke who do not reguarly perform bargaining work and who are supervisors within the meaning of Section 2(11) of the Act and who are also Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.[7]

Another issue on which the parties reached impasse was Respondents' subcontracting proposal which included all the provisions of article I, paragraph 103, and all its subparts, set forth below:

103. The purposes of this paragraph 103 are to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, maintenance and protection of standards and benefits of employees and workmen negotiated over many years, and preservation of the right of union employees, employed hereunder, from being compelled to work with non-union workmen.

103.1 In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Court upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

103.1.1 Definition of Subcontractor. A subcontractor is defined as any person (other than an employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on

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[7]Art II—union recognition, and sec. 1612 of Respondents' contract proposals are set forth *infra*.

behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement.

103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

103.3 Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), herein called "jobsite work", and because of the Union's concern that subcontractors who are not subject to the same total labor costs as those who are party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:

103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less

than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

103.3.2 The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.3.1.

103.3.3 Failure to comply with the foregoing subparagraph 103.3.1 and 103.3.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorney's fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance.

103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance

and compliance by his subcontractors with the full terms of this Agreement."

Since August 4 no further collective-bargaining sessions have been held, and neither Respondents nor Woelke has requested further negotiations. In furtherance and support of Respondents' aforementioned labor dispute with Woelke, and in support of Respondents' demand for the contract provisions described above, Respondent Local No. 235 picketed at the Columbia, Alessandro, and Lincoln jobsites on August 10, September 21, and October 5, respectively, with signs reading:

Information
WOELKE & ROMERO
Operating
NONE [sic] UNION
Carpenters

On August 28 Respondent Local No. 944 picketed at the Rockford jobsite with picket signs identical to those described above. As a consequence of the acts and conduct of Respondent Local No. 235 set forth above, individuals employed by various subcontractors of Vanguard and Birth engaged in work stoppages and refusals to perform services for their respective employers at the Columbia and Alessandro jobsites.

C. *Contentions*

1. The subcontracting proposals

The General Counsel and Woelke contend essentially that Respondents' subcontracting proposals set forth in paragraphs 103.2, 103.3.1, 103.5, and 103.6, *supra*, are proscribed by Section 8(e) of the Act and that Respondents' picketing in support of these proposals therefore violated Section 8(b)(4)(i) and (ii)(A) of the Act. Specifically, General Counsel and Woelke argue that the proposed subcon-

tracting provisions are secondary union signatory clauses and, as such, are presumptively unlawful unless privileged by the construction industry proviso to Section 8(e). General Counsel and Woelke further argue that the clauses here are not privileged by the proviso because they do not comport with the Supreme Court's interpretation of that proviso in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Accordingly, General Counsel and Woelke contend that the picketing by Respondents to compel Woelke to agree to these clauses violated Section 8(b)(4)(i) and (ii)(A) of the Act.

Respondents, on the other hand, contend that the proposed subcontracting provisions are lawful primary clauses because they are designed to preserve traditional bargaining unit work for bargaining unit employees and to maintain economic standards at jobs performed by union members. Respondents also argue that the provisions in issue, even if deemed to be secondary in nature, are lawful in any event because they are protected by the construction industry proviso to Section 8(e) of the Act. Respondents argue that *Connell, supra,* is not applicable to the instant dispute because, unlike the critical facts in that case, Respondents here have a lawful collective-bargaining relationship with Woelke.

The *amici curiae* briefs of the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America provide additional argument in general support of the positions taken by Respondents and by General Counsel and Woelke, respectively.

2. The proposal to include foremen in unit

The General Counsel and Woelke contend that Respondents' insistence to impasse upon, and picketing in support of, their proposal to include within the collective-bargaining

unit Woelke's foremen who are supervisors within the meaning of Section 2(11) of the Act, and whom Woelke has selected as its collective-bargaining and grievance-adjusting representatives within the meaning of Section 8(b)(1)(B) of the Act, constitutes unlawful restraint and coercion within the meaning of Section 8(b)(1)(B) of the Act. Neither Respondents' brief nor the briefs filed by *amici curiae* addressed this issue.

D. *Discussion and Conclusions*

1. The subcontracting proposals

The gravamen of the complaint is that Respondents' proposed subcontracting clauses quoted above are violative of Section 8(e) of the Act and that Respondents' picketing in support thereof violated Section 8(b)(4)(i) and (ii)(A) of the Act.[8] Respondents contend that the clauses are primary in

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[8]Sec. 8(e) of the Act provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

Sec. 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e).

nature because they seek to preserve traditional bargaining unit work for bargaining unit employees and because they are designed to maintain economic standards on jobs at which union members work. Respondents further contend that, in any event, the clauses are protected by the construction industry proviso to Section 8(e). With the issues thus joined, our first area of inquiry is whether the disputed clauses, notably paragraphs 103.2, 103.3, 103.5, and 103.6, are primary or secondary in scope. If they are primary, then Respondents' picketing to obtain these clauses would clearly be lawful. If, however, the clauses are secondary in nature, we must determine whether they are nevertheless privileged by the construction industry proviso to Section 8(e). of the Act. In this connection we must determine to what extent, if any, the Supreme Court's decision in *Connell, supra,* narrowed the scope of that proviso as previously interpreted by the Board and courts, particularly as it relates to the facts stipulated here. If we conclude that the disputed clauses are privileged under the proviso, then Respondents' picketing of Woelke to obtain these clauses also would be lawful. If, on the other hand, the clauses are not so privileged, then, of course, the picketing by Respondents violated Section 8(b)(4)(i) and (ii)(A) of the Act.

It is well settled that contract clauses which are limited to primary considerations, such as the preservation or protection of the traditional work of employees in the bargaining units represented by a union, are not proscribed by Section 8(e) of the Act. *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967). As the Court stated in that decision, at 644-645:

> The determination of whether the [challenged contract provision] . . . violated Section 8(e) and Section 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the

> Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] . . . would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees. [Citations omitted.]

The ultimate question in each case, therefore, is whether the thrust of the clause in question is primary and, therefore, lawful or whether it is secondary and, accordingly, unlawful.

The distinction between primary and secondary clauses was succinctly spelled out by the Board in *California Dump Truck Owners Association*[9] as follows:

> Section 8(e) of the Act makes it an unfair labor practice for an employer and a union to enter into an agreement, express or implied, whereby the employer agrees to cease dealing in the products of any other employer or to cease doing business with any other person. A literal construction of this section suggests the illegality of any agreement which results in pre-

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[9]*Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al. (California Dump Truck Owners Association)*, 227 NLRB 269, 272 (1976) (then-Member Fanning and Member Jenkins dissenting in part).

venting the employer from establishing a business relationship with another employer, or which causes him to break off a relationship already established. The section, however, has not been construed to outlaw all agreements which produce such results.

Contract clauses which purport to limit subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, and contract clauses which purport to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers, so-called work acquisition clauses, have been held to violate the Act. Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees covered by the contract, but as directed at furthering general union objectives and undertaking to regulate the labor policies of other employers. Absent a direct relationship to protection of the work of unit employees, such clauses are considered as having an unlawful secondary effect and are proscribed by Section 8(b)(4) and (e).

On the other hand, however, contract clauses whose basic aims are to limit subcontracting so as to preserve for unit employees work which has customarily been performed by them, or in some instances to recapture work regarded as fairly claimable, so-called unit protection clauses, and contract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, have been held to be lawful. The underlying rationale for the lawful character of unit protection and union standard clauses is that the union has a primary interest in preserving unit work for unit employees and to insure that negotiated standards will not be undermined. [Citations omitted.]

It is equally well settled, as reflected in the foregoing quotations, that contract clauses which permit subcontracting only to subcontractors who pay their employees at least the equivalent of the economic terms negotiated in the union's contract are also primary clauses which do not contravene the prohibition of Section 8(e). In *Construction Materials Trucking, Inc.*,[10] the Board, adopting the opinion of its Trial Examiner, explained at 1038 the underlying reasoning supporting the area or union standards clauses as follows:

> A union has a legitimate interest in preventing the undermining of the work opportunities and standards of employees in a contractual bargaining unit by subcontractors who do not meet the prevailing wage scales and employee benefits covered by the contract. Thus, its contract with an employer may require the employer, if it subcontracts, to subcontract to another employer who agrees to observe "the equivalent of union wages, hours, and the like" provided for in the bargaining agreement. Such a provision, generally referred to as a union standards clause, does not violate Section 8(e) because it has a primary object: to aid the employees in the work unit. Where, however, the object is not to protect or preserve the working standards of employees in the unit, but to control the employment practices of firms which seek to do business with the employer and to aid and assist union members generally, such object is secondary and unlawful. [Citations omitted.]

Respondents' proposed paragraph 103.2 requires the contractor to agree "that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the

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[10] *General Teamsters Local 386, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Construction Materials Trucking, Inc.)*, 198 NLRB 1038 (1972).

site of construction . . . except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." This clause, contrary to Respondents' contentions, goes far beyond protecting traditional bargaining unit work for bargaining unit employees. For the clause does not prohibit Woelke from subcontracting work which Woelke's employees perform or could perform, but, rather, expressly permits such subcontracting, albeit only to employers who are signatory to a "current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

Similarly, proposed paragraph 103.2 also does not limit subcontracting to firms which pay their employees the equivalent of the economic provisions of Respondents' contract, but, instead, requires that all subcontracting be to employers or firms who are "signatory to this Agreement." Therefore, the foregoing provision is neither a valid work preservation clause nor a valid union standards provision. Rather, the provision is a classic union signatory clause of the type which the Board has consistently found to be secondary in nature because it is not concerned primarily with the labor relations of the contracting employer—Woelke here—*vis-a-vis* its employees, but with the labor relations of other employers or firms with whom Woelke might choose to do business.[11] Thus, we find that paragraph 103.2 is a union signatory clause which is proscribed by Section 8(e) of the Act, unless it is saved by that section's construction industry proviso.

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[11] *General Teamsters, Chauffeurs, Warehousemen and Helpers*, Local 2, *IBT* (J.K. Barker Trucking Co.), 181 NLRB 515, 519-520 (1970); *Local 437, International Brotherhood of Electrical Workers, AFL-CIO* (*Dimeo Construction Co.*), 180 NLRB 420 (1969).

Before discussing whether the construction industry proiso saves paragraph 103.2 from unlawfulness, we address briefly Respondents' alternative proposal — paragraph 103.3.1 — which, under Respondents' total subcontracting proposal, would become operational in the event that paragraph 103.2 is enjoined by a court or is found unlawful by the Board.

Paragraph 103.3.1 provides that the employer (Woelke) may subcontract jobsite work only to employers whose employees "are members of a bona fide labor organization" and whose total labor costs on the jobsite "are not less than those of contractors performing similar work to that covered by this Agreement, including . . . [enumerated benefits] as provided by this Agreement." General Counsel and Woelke contend that this is but a thinly disguised union signatory provision. General Counsel argues that the secondary objective of this clause is evidenced by its requirement that subcontractors pay their employees the specifically enumerated benefits "as provided by this Agreement" and the further requirement that employees of subcontractors be members of a bona fide labor organization. Respondents, on the other hand, contend that this clause is a lawful area standards provision.

Contrary to Respondents' contention, we find that the clause exceeds the permissible bounds of a lawful area standards provision.[12] Thus, it is not limited to assuring that subcontractors pay their employees the cost equivalent of Respondents' contract, but it additionally requires that the subcontractors' employees be "members of a bona-fide labor organization." It is the latter requirement which, in our view, removes the clause from the sphere of lawful area standards provisions. For the union membership or non-

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[12] *Dimeo Construction Co., supra.*

membership of the subcontractor's employees can have no legitimate bearing on whether the subcontractor pays the equivalent of the economic costs provided in Respondents' contract. *N.L.R.B. v. Bangor Building Trades Council (Davison Constr. Co.)*, 278 F.2d 287, 290 (1st Cir. 1960); *Building and Construction Trades Council of San Bernardino and Riverside Counties et al., (Gordon Fields) v. N.L.R.B.*, 328 F.2d 540, 541 (D.C. Cir. 1964).

Having found that Respondents' proposed subcontracting provisions are neither primary work preservation nor area standards clauses, we turn now to whether these clauses, although secondary in their thrust, are nevertheless protected by the construction industry proviso. In this connection, we must determine first whether such contract provisions as those here in dispute were held to be protected by the proviso to Section 8(e) before the Supreme Court's decision in *Connell, supra,* and, if so, whether they no longer enjoy such protection since *Connell.*

Since the enactment of the 1959 amendments to the Act, the Board and courts have consistently upheld contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatory to contracts either with a particular union or with unions having jurisdiction over the type of work involved. Although the Board initially held that picketing to obtain such union signatory contracts violated Section 8(b)(4)(A) of the Act, such holdings were

denied enforcement in several courts of appeals.[13] Subsequently, in *Northeastern Indiana Building and Construction Trades Council, et al.* (*Centlivre Village Apartments*, 148 NLRB 854 (1964), the Board acquiesced in the courts' views and held that the union signatory clauses are not only protected by the proviso to Section 8(e) but also that picketing to secure such clauses was not unlawful under Section 8(b)(4)(A) of the Act. Thus, the Board has upheld clauses such as those herein, which are not limited to particular existing jobsites or to the duration of particular jobs. The only limitation on union signatory clauses was that they could not be enforced by union "self-help" measures.[14]

As can be seen from the foregoing cases, as well as others too numerous to cite, the Board, with court approval, has construed the construction industry proviso literally to protect "any agreement" between qualified parties which limits subcontracting of work to be performed at the site of con-

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[13]*Construction, Production & Maintenance Laborers' Union, Local 383, AFL-CIO & United Brotherhood of Carpenters & Joiners of America, Local 1089, AFL-CIO* (*Colson & Stevens Construction Co.*), 137 NLRB 1650 (1962), enfd. in part 323 F.2d 422 (9th Cir. 1963). *Orange Belt District Council of Painters No. 48* (*Calhoun Drywall Company*), 139 NLRB 383 (1962), vacated and remanded 328 F.2d 534 (D.C. Cir. 1964). *The Essex County and Vicinity District Council of Carpenters, etc.* (*The Associated Contractors of Essex County, Inc.*), 141 NLRB 858 (1963), enforcement denied 332 F.2d 636 (3d Cir. 1964). *Building and Construction Trades Council of San Bernardino, etc.* (*Gordon Fields*), 139 NLRB 236 (1962), enforcement denied 328 F.2d 540 (D.C. Cir. 1964). See also *Local Union No. 48 of Sheet Metal Workers International Association v. The Hardy Corporation*, 332 F.2d 682 (5th Cir. 1964).

[14]*Ets-Hokin Corporation*, 154 NLRB 839, 842 (1965), and cases cited therein, enfd. *sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 769*, 405 F.2d 159, 162-163 (9th Cir. 1968), cert. denied 395 U.S. 921 (1969, *Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al.* (*California Dump Truck Owners Association*), 227 NLRB 269 (1976) (then-Member Fanning and Member Jenkins dissenting in part).

struction to employers who are signatory to a specific union agreement or to an agreement generally with the "appropriate union" (meaning, generally, an affiliate of a building and construction trades council). Remaining at issue, then, is whether and to what extent the Supreme Court's decision in *Connell* has limited the scope of the proviso from its previous broad interpretation.

General Counsel and Woelke argue that the scope of the proviso has been "significantly narrowed" by the *Connell* decision. Thus, General Counsel argues that, based upon the Supreme Court's rationale in *Connell*, a contractual provision which is otherwise violative of Section 8(e) of the Act will not be privileged by the construction industry proviso thereto unless: (1) a valid collective-bargaining relationship exists between the labor organization and the employer, (2) the contractual clause is operational only at times when the employer has employees represented by the labor organization, (3) the clause applies only to sites at which the employer has employees represented by the labor organization, and (4) the clause does not require that the employer have collective-bargaining relationships with particular unions.

General Counsel and Woelke concede that Respondents and Woelke have a lawful collective-bargaining relationship and, therefore, do not contend that any collective-bargaining relationship requirement of *Connell* is wanting. General Counsel argues, however, that Respondents' proposed clauses 103.2, 103.3.1, 103.5, and 103.6 are not privileged by the construction industry proviso, pursuant to *Connell*, because said clauses (1) are operational at all times and at all jobsites whether or not Woelke employs employees working within the craft jurisdiction of Respondents and (2) require that Woelke must subcontract only to particular labor organizations. Respondents, on the other hand, argue

that *Connell* is inapplicable here because, among other reasons, a lawful collective-bargaining relationship exists between Respondents and Woelke, a factor which the Court found was critically lacking in *Connell*. For the reasons discussed below, we reject General Counsel's contention and find, instead, that the subcontracting provisions here involved are protected by the construction industry proviso. Such conclusion, we are persuaded, is fully consistent with the teachings of *Connell*.

The relevant facts in *Connell*, an antitrust action, are simple and straightforward. Local 100 picketed certain general contractors in the Dallas, Texas, area, including Connell, for the sole purpose of compelling such contractors to agree that, in letting subcontracts for the performance of mechanical work, they would deal only with firms that were parties to that union's current collective-bargaining agreement. The avowed purpose of this contract was to assist Local 100 in its efforts to organize the mechanical subcontractors in the area. Local 100 had no contract with Connell, Connell employed no workers of the type whom Local 100 exists to represent, and, significantly, Local 100 expressly disclaimed any interest in representing Connell's employees. Local 100 did not seek a complete bargaining contract with Connell, but only a subcontracting agreement. Connell succumbed to the picketing and, thereafter, filed suit in a Federal district court to annul the resulting agreement as an illegal restraint on competition under sections 1 and 2 of the Sherman Act. Local 100 defended on the ground that the subcontracting agreement was protected by the construction industry proviso to Section 8(e) of the Act. Connell, on the other hand, argued that, despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that is, Congress did not intend to

permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors for the purpose of organizing such nonunion subcontractors from the "top down."

The specific question before the Court was whether the existence of a collective-bargaining relationship constituted a prerequisite to or, as the Court phrased it, a limitation on the applicability of the construction industry proviso to clauses restricting the subcontracting of work on a construction site. The Court's interpretation of the legislative history and the policies underlying the proviso was conducted solely with a view toward determining whether the proviso was so limited. Thus, the Court stated at the outset of its decision:

> On its face, the proviso suggests no such limitation. This Court has held, however, that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment.[15]

The Court's subsequent construction of the proviso led to the conclusion that, in the absence of a collective-bargaining relationship between Connell and Local 100, the proviso did not immunize Local 100's subcontracting agreement from Federal antitrust laws.

In reaching its conclusion, the Court examined the legislative as well as decisional history of the 1959 amendments, including Section 8(b)(4) and 8(e). It noted that Congress, in enacting Section 8(e), was concerned essentially with plugging certain technical loopholes in Section 8(b)(4) under which it was unlawful for a union to coerce an employer to agree to or enforce a hot cargo agreement but not unlawful for a union and employer voluntarily to execute such hot cargo agreement. *Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL,*

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[15]*Connell, supra,* 421 U.S. at 628.

etc. [*Sand Door and Plywood Company*] *v. N.L.R.B.*, 357 U.S. 93, 106-107 (1958). Thus, Section 8(e) was designed in 1959 to close that loophole by making it an unfair labor practice to enter into a hot cargo agreement. At the same time, however, Congress was also considering legislation that would have overruled *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), by treating all employers working on the same construction site as a single employer. The attempt to overrule that case failed. The Court surmised that the construction industry proviso was adopted "as a partial substitute" for an outright reversal of *Denver Building Trades*. The Court noted that the legislative discussion of "special problems" in the construction industry focused on the close relationship between contractors and subcontractors at the jobsite and the friction that is created when union and nonunion employees are required to work side by side. Thus, Congress limited the construction industry proviso exclusively to work to be done at a construction site. Quoting from *National Woodwork Manufacturers Association, supra*, 386 U.S. at 638-639, the Court stated that it has interpreted the construction industry proviso as

> a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other.

The Court noted that other courts have suggested that the proviso serves an even narrower function of alleviating frictions that may arise between union and nonunion employees working together at the same construction site.[16]

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[16]*Connell, supra*, 421 U.S. at 630, citing *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Local Union No. 695. IBT (Threlfall Construction Company) v. N.L.R.B.*, 361 F.2d 547 (D.C. Cir. 1966).

Thus, the Court identified certain policies underlying the enactment of the proviso which are relevant to determining the applicability of the proviso to subcontracting clauses disputed between parties who do not have a collective-bargaining relationship. It concluded that the *Connell* clause was not related to these policies in that Local 100 did not claim to be protecting Connell's employees from having to work alongside nonunion workers and was not seeking to organize any nonunion subcontractors on the jobsite it picketed; instead, the union admittedly sought the subcontracting agreement solely as a means of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees.

In these circumstances, the Court found that extending the protection of the proviso to the clause sought by Local 100 would undermine one of the major aims of the 1959 Act, which was to limit "top-down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. The Court reasoned in *Connell*, 421 U.S. at 631-632:

> If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere.

The Court rejected Local 100's argument that the Board had already decided this issue in *Los Angeles Building and Construction Trades Council (Joseph Freed & Benjamin H. Weber, d/b/a B & J Investment Company)*, 214 NLRB 562 (1974), wherein the Board held at 563 that "a union has

the right to picket to compel an employer to execute a labor agreement containing a subcontracting clause valid under the construction industry proviso to Section 8(e), as long as it does not have the additional objective of forcing an employer to cease doing business with 'an existing and identified nonunion subcontractor.' " The Court at 631, footnote 10, of its opinion in *Connell*, noted that the "agreement in question *in B&J* may have been a prehire contract under § 8(f), and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship."

Thus, the Court's entire decision is cast in terms of the impact of the absence of a collective-bargaining relationship upon the applicability of the proviso to a subcontracting clause which comes within the literal language of the proviso. That this is the heart of the *Connell* decision is evident from the Court's concluding statement:

> [W]e are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.[17]

Contrary to the General Counsel's contention, we find nothing in our analysis of *Connell* which compels a narrower interpretation of the proviso as suggested by General Counsel. The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly

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[17]*Connell, supra*, 421 U.S. at 633.

even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem.

Inasmuch as Respondents' proposed contract provisions here were advanced in the context of a collective-bargaining relationship between Respondents and Woelke, we find that the clauses are privileged by the construction industry proviso to Section 8(e) of the Act. Accordingly, we shall dismiss the complaint to the extent that it alleges that Respondents' picketing of Woelke in support of the subcontracting proposals violated Section 8(b)(4)(i) and (ii)(A) of the Act.

2. *The 8(b)(1)(B) issue; Respondents' proposal to include foremen in unit.*

It is clear from the stipulated facts that Respondents and Woelke bargained to impasse over the inclusion of foremen within the bargaining unit represented by Respondents.[18] It also stipulated that these foremen are supervisors

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[18]The text of Respondents' contract proposals concerning foremen reads as follows:

ARTICLE II—UNION RECOGNITION

201. The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. It is understood that the Union does not at this time, nor will it during the term of this Agreement, claim jurisdiction over the following classes of employees; executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman. Employees and persons employed to perform work covered by this Agreement specifically include Craft Foreman. A Superintendent or assistant superintendent shall not give work instructions to journeymen carpenters or apprentices.

1612. Foremen: The selection of the individual who will be craft foreman is at the sole discretion of the Contractor. Is is understood that a craft foreman shall be an employee employed under the terms of this Agreement and shall receive the foreman's differential. Such craft foreman may work with the tools of the trade in accordance with the provisions of paragraph 403. Only craft foremen who normally work with the tools of their trade during straight-time periods may work with the tools of their trade during overtime periods. Whenever there are two or more journeymen employees one must be designated as a foreman. When

(footnote continued on following page)

within the meaning of Section 2(11) of the Act and Woelke's selected representatives for purposes of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B). It is further stipulated that these foremen do not perform bargaining unit work. Finally, it is stipulated that an object of Respondents' picketing was to compel Woelke to agree to include these foremen in the unit. General Counsel contends that, by the foregoing conduct, Respondents violated Section 8(b)(1)(B) of the Act.

Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances. Since enactment of this provision in 1947, the Board has consistently held that strikes to compel employers to select their foremen from within the ranks of the union are clearly proscribed.[19] More recent Board decisions confirm that the mere attempt by unions to compel inclusion

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a carpenter is designated as a foreman and is assigned the responsibility of supervision of five or more journeyman he shall not be allowed to work as a journeyman. In case more than two foremen are employed on the same shift on the same job, it shall be designated a general foreman whose duty shall be to convey orders from the contractor to the foreman. No carpenter foreman shall supervise a crew of more than ten men, not including himself. A carpenter foreman can supervise a crew on one jobsite only. The need for any number of craft foremen required for the performance of the work shall be determined in accordance with the provisions of paragraph 402. It is understood that in certain cases, by reason of custom and practice established by the parties, a craft foreman may direct the work and employees of more than one craft. Whenever the employer assigns supervisory authority to an employee covered by the terms of this Agreement, the employee will be paid at the foreman's rate.

[19]*International Typographical Union and Baltimore Typographical Union No. 12 (Graphic Arts League)*, 87 NLRB 1215, 1218 (1949); *International Typographical Union, AFL-CIO (Haverhill Gazette Company)*, 123 NLRB 806 (1959), enfd. 278 F.2d 6 (1st Cir 1960).

of statutory supervisors within the collective-bargaining unit is, without more, violative of Section 8 (b)(1)(B) of the Act.[20] In view of the stipulated facts and the applicable laws and Board precedent in this area, we find and conclude that Respondents violated Section 8(b)(1)(B) of the Act by bargaining to impasse and by striking Woelke with an object of forcing Woelke to agree to include its statutory supervisors within the bargaining unit represented by Respondents.

Conclusions of Law

1. Woelke & Romero Framing, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By bargaining to impasse, striking, or picketing Woelke & Romero Framing, Inc., for the purpose of requiring the inclusion in the collective-bargaining unit of any foremen of Woelke & Romero who are supervisors within the meaning of Section 2(11) of the Act and Woelke & Romero's selected representatives for purposes of collective bargaining or adjustment of grievances, Respondents have violated Section 8(b)(1)(B) of the Act.

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[20] *International Organization of Masters, Mates, and Pilots, AFL-CIO (Cove Tankers Corporation)*, 224 NLRB 1626 (1976); *International Organization of Masters, Mates and Pilots, Marine Division, etc. (Westchester Marine Shipping Co., Inc., et al.)*, 219 NLRB 26 (1975). See also *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790 (1974); *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974).

4. The above unfair labor practices are unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondents have not violated the Act in any other manner.

Remedy

Having found that Respondents have violated Section 8(b)(1)(B) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action which we find will effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, San Bernardino, California; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Riverside, California, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Bargaining to impasse, striking, or picketing Woelke & Romero Framing, Inc., or any other employer, for the purpose of requiring such employer to agree to include within the bargaining unit any foremen who are supervisors within the meaning of Section 2(11) of the Act and who are such employers' selected representatives for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

(b) In any like or related manner restraining or coercing Woelke & Romero Framing, Inc., in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action:

(a) Post at their offices and meetings halls copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

APPENDIX

Notice To Members
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

We will not bargain to impasse, strike, or picket Woelke & Romero Framing, Inc., or any other employer, for the purpose of requiring such employer to agree to include within the bargaining unit any foremen who are supervisors within the meaning of Section 2(11) of the National Labor Relations Act and who are such employers' selected representatives for the purposes of collective bargaining or the

---

[21]In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

We will not in any like or related manner restrain or coerce Woelke & Romero Framing, Inc., in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, ALF-CIO

Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

Office - Supreme Court, U.S.
FILED
NOV 23 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

October Term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOINT APPENDIX — VOLUME I (No. 80-1798)

JOHN W. PRAGER, JR.,
MUSICK, PEELER & GARRETT,
4000 MacArthur Blvd., Suite 900,
Newport Beach, Calif. 92660,
(714) 752-6100,

Counsel for Petitioner,
Woelke & Romero Framing, Inc.
(names and addresses continued on inside front cover)

PETITIONS FOR WRITS OF CERTIORARI FILED April 29, 1981 (No. 80-1798), April 29, 1981 (No. 80-1808), and July 14, 1981 (No. 81-91).
WRITS OF CERTIORARI GRANTED OCTOBER 5, 1981.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ABE F. LEVY,
GORDON K. HUBEL,
LEVY & GOLDMAN,
3550 Wilshire Blvd., Suite 1020,
Los Angeles, Calif. 90010,
(213) 380-3140,
Attorneys for Respondents, Carpenters Union Locals 944 and 235.

REX E. LEE,
Solicitor General,
U.S. Department of Justice,
Washington, D.C. 20530,
(202) 633-2000,

NORTON J. COME,
Deputy Associate General Counsel,
National Labor Relations Board,
1717 Pennsylvania Avenue, N.W.,
Washington, D.C. 20570,
(202) 254-9417,
Attorneys for Respondent, National Labor Relations Board.

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CHRONOLOGICAL LIST OF IMPORTANT DATES AND DOCKET ENTRIES.

1. *August 11, 1977* — Woelke & Romero Framing, Inc. ("Woelke & Romero") files Unfair Labor Practice Charge in Case No. 21-CC-1922 with Region 21, National Labor Relations Board ("NLRB").
2. *September 23, 1977* — NLRB, by its Director for Region 21, issues Unfair Labor Practice Complaint on Charge filed by Woelke & Romero in Case No. 21-CC-1922.
3. *October 19, 1977* — Woelke & Romero, Unions and NLRB General Counsel agree to Stipulation of Facts, and file joint Motion Waiving Hearing Before Administrative Law Judge and Transferring Proceeding to NLRB for Decision.
4. *December 13, 1977* — NLRB grants Motion to Transfer.
5. *February 8, 1978* — NLRB consolidates No. 21-CC-1922 with other cases, and orders oral argument.
6. *February 23, 1978* — NLRB holds oral argument in consolidated cases.
7. *November 13, 1978* — NLRB issues Decision and Order on Charge and Complaint in Case No. 21-CC-1922.
8. *November 14, 1978* — Woelke & Romero files Petition for Review of NLRB Decision and Order with U.S. Court of Appeals for Ninth Circuit (docketed as No. 78-3468).
9. *April 25, 1979* — U.S. Court of Appeals for Ninth Circuit consolidates No. 78-3468 with related cases, Nos. 78-3469, 78-3487, 78-3619, and 79-7011.
10. *October 4, 1979* — U.S. Court of Appeals for the Ninth Circuit, a three-judge panel, hears oral argument in the consolidated cases, and the matters are submitted for decision.
11. *December 26, 1979* — U.S. Court of Appeals, a three-judge panel, issues its Opinion in consolidated cases *sub nom. Pacific Northwest, etc. v. NLRB, etc.*, 609 F.2d 1341 (9th Cir., 1979) reversing NLRB.
12. *January 30, 1980* — NLRB and Unions file Petition for Rehearing and Suggestion for Rehearing *En Banc*.
13. *August 19, 1980* — U.S. Court of Appeals for Ninth Circuit issues Order Granting Petition for Rehearing *En Banc*.
14. *October 16, 1980* — U.S. Court of Appeals for Ninth Circuit, *en banc*, hears oral argument in consolidated cases, Nos. 78-3468, 78-3469, 78-3487, 78-3619, and 79-7011, and the matters are submitted for decision.
15. *April 17, 1981* — U.S. Court of Appeals for Ninth Circuit, *en banc*, issues its Opinion in consolidated cases.

16. *April 29, 1981* — Woelke & Romero files its Petition for Writ of Certiorari with U.S. Supreme Court (No. 80-1798).

17. *October 5, 1981* — U.S. Supreme Court grants Petition for Writ of Certiorari, and consolidates No. 80-1798, with No. 80-1808, and No. 81-91.

ITEM 1.

NLRB Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing.

United States of America Before the National Labor Relations Board, Region 21.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Woelke & Romero Framing, Inc. Cases Nos. 21-CB-6196, 21-CC-1922.

It having been charged by Woelke & Romero, herein correctly designated Woelke & Romero Framing, Inc., and called Woelke, in cases Nos. 21-CB-6196 and 21-CC-1922 that Carpenters Local No. 944, herein correctly designated Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, herein correctly designated Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Respondent 944 and Respondent 235, respectively, and collectively called Respondents, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary cost or delay.

HEREBY ORDERS, pursuant to Section 102.33(c) of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Consolidated Complaint and Notice of Hearing, and alleges as follows:

1. The charges in Cases Nos. 21-CB-6196 and 21-CC-1922 were filed by Woelke on August 11, 1977, and copies thereof were served on Respondents on the same date by registered mail.

2. Respondents are, and each of them is, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. (a) At all times material herein, Joseph Eickholt, herein called Eickholt, has been, and is now, a representative of Respondents, acting on their behalf, and at all times material herein has been, and is now, an agent of Respondents within the meaning of Section 2(13) of the Act.

(b) At all times material herein, George Holt, herein called Holt, has been, and is now, a business agent of Respondent 235, acting on its behalf, and at all times material herein has been, and is now, an agent of Respondent 235 within the meaning of Section 2(13) of the Act.

4. At all times material herein, Dale Messer, herein called Messer, has been, and is now, a representative of Respondent 944, acting on its behalf, and at all times material herein has been, and is now, an agent of Respondent 944 within the meaning of Section 2(13) of the Act.

5. (a) Vanguard Builders, Inc., herein called Vanguard, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in Southern California as a general contractor. At all

times material herein, Vanguard has been engaged as the general contractor on construction projects located at Columbia and Main Streets, Riverside, California, herein called the Columbia jobsite, and at Lynwood and Rockford Avenue, San Bernandino, California, herein called the Rockford jobsite.

(b) Birth Development Company, Inc., herein called Birth, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in Southern California in the construction and sale of single-family residences. At all times material herein, Birth has been engaged in the construction of a single-family residence tract located at Alessandro Boulevard and Via Vista in Riverside, California, herein called the Alessandro jobsite.

6. (a) Woelke, with a place of business located in San Bernardino, California, is engaged in the building and construction industry in Southern California specializing in framing. At all times material herein, Woelke has been engaged, pursuant to subcontracts with Vanguard and Birth, in framing work at the Rockford and Columbia jobsites and at the Alessandro jobsite.

(b) During the normal course and conduct of its business operations described in paragraph 6(a) above, Woelke annually purchases and receives goods and products valued in excess of $50,000 from suppliers located within the State of California, each of which purchases and receives said goods directly from suppliers located outside the State of California.

(c) Woelke is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a person engaged in commerce and in

an industry affecting commerce within the meaning of Section 8(b)(4)(i), (ii)(A) and (B) of the Act.

7. Vanguard and Birth are, and each of them is, and have been at all times material herein, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i), (ii)(A) and (B) of the Act.

8. At all times material herein, the individuals listed below have been, and are now, supervisors of Woelke within the meaning of Section 2(11) of the Act and Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act:

Gerald M. Castle
Tony R. Lopez

9. (a) At all times material herein, Respondents, and each of them, have been engaged in a labor dispute with Woelke.

(b) At no time material herein have Respondents, or either of them, been engaged in a labor dispute with Vanguard or any of its subcontractors other than Woelke, or with Birth or any of its subcontractors other than Woelke.

10. Since on or about June 3, 1977, and continuing to date, Respondents, through Eickholt, have demanded that Woelke enter into a successor collective-bargaining agreement containing the following provisions:

> (new) 103.2. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm

or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

* * * * * * * *

(new) 103.3.1. The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

* * * * * * * *

(new) 103.5. All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

(new) 103.6. If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement.

* * * * * * * *

11. Since on or about June 3, 1977, and continuing to date, Respondents, through Eickholt, have demanded that Woelke include within the unit of employees whom Respondents will represent for purposes of collective bargaining,

foremen of Woelke who are supervisors within the meaning of Section 2(11) of the Act and who are also Woelke's selected representatives for purposes of collective bargaining or adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

12. In furtherance and support of Respondents' aforementioned labor disputes with Woelke and Respondents' demands for the contract provisions described in paragraphs 10 and 11 above:

(a) Respondent 235 picketed at the Columbia jobsite commencing on or about August 10, 1977, with picket signs reading as follows:

"Information WOELKE & ROMERO operating NONE UNION carpenters"

(b) Respondent 944 picketed at the Rockford jobsite commencing on or about August 28, 1977, with picket signs identical to those described in paragraph 12(a) above.

(c) Respondent 235 picketed at the Alessandro jobsite commencing on about September 21, 1977, with picket signs substantially the same as those described in paragraphs 12(b) and 12(c) above.

13. Since on or about August 11, 1977, and continuing to date, the American Street entrance to the Columbia jobsite has been reserved for the exclusive use of Woelke and its employees and suppliers. At all times material herein, since on or about August 11, 1977, the Columbia Street entrance to the Columbia jobsite has been reserved for the exclusive use of Vanguard and its subcontractors, and Woelke and its employees and suppliers have been barred from using said entrance to the Columbia jobsite.

14. Since on or about August 11, 1977, and continuing to date, Woelke and its employees and suppliers have ex-

clusively used, and continue to use, the American Street entrance to the Columbia jobsite.

15. Commencing on or about August 11, 1977, Respondent 235, notwithstanding the reservation of the American Street entrance to the Columbia jobsite for the exclusive use by Woelke and its employees and suppliers and the exclusive use by persons other than Woelke of the Columbia Street entrance to the Columbia jobsite, and notice thereof to Respondent 235, picketed both the Columbia Street and the American Street entrances to the Columbia jobsite.

16. Since on or about August 23, 1977, and until on or about August 26, 1977, Respondent 235, through its agents, patrolled at or in the vicinity of areas around the Columbia jobsite other than the American Street entrance to the Columbia jobsite reserved for Woelke.

17. As a consequence of the acts and conduct of Respondent 235 set forth in paragraphs 9, 12(a) and 12(c), 15, and 16 above, in the circumstances described in paragraphs 13 and 14 above, individuals employed by various subcontractors of Vanguard and Birth, and by other persons engaged in commerce, have engaged in work stoppages and refusals to perform services for their respective employers at the Columbia jobsite and Alessandro jobsite and work at such jobsites was, and is now, substantially shut down.

18. (a) On or about August 23, 1977, Respondent 235, through Holt, at the Columbia jobsite, threatened Gerald M. Castle with suspension, expulsion, loss of union benefits, legal action, or other union disciplinary action if he continued to work for Woelke behind Respondent 235's picket line.

(b) At no time material herein has Gerald M. Castle performed any work usually performed by employees of Woelke represented by Respondent 235.

19. (a) On or about August 23, 1977, Respondent 944, through Messer, at the Rockford jobsite, threatened Tony R. Lopez with suspension, expulsion, loss of union benefits, legal action, or other union disciplinary action if he continued to work for Woelke behind Respondent 944's picket line.

(b) At no time material herein has Tony R. Lopez performed any work usually performed by employees of Woelke represented by Respondent 944.

20. By the acts and conduct set forth in paragraph 12(b) above, Respondent 944 has engaged in, and has induced and encouraged individuals employed by Woelke and by other persons engaged in commerce or in industries affecting commerce to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced, and restrained Woelke and other persons engaged in commerce or in industries affecting commerce.

21. By the acts and conduct set forth in paragraph 12(a) above, Respondent 235 has engaged in, and has induced and encouraged individuals employed by Woelke and by other persons engaged in commerce or in industries affecting commerce to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced, and restrained Woelke and other persons engaged in commerce or in industries affecting commerce.

22. By the acts and conduct set forth in paragraph 12(c) above, Respondent 235 has engaged in, and has induced and encouraged individuals employed by Woelke and various other subcontractors of Birth at the Alessandro jobsite,

and by each of them, and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced, and restrained Woelke, Birth, its other subcontractors, and each of them, and others persons engaged in commerce or in industries affecting commerce.

23. By the acts and conduct set forth in paragraphs 15 and 16 above, in the circumstances described in paragraphs 13 and 14 above, Respondent 235 has engaged in, and has induced and encouraged individuals employed by various subcontractors of Vanguard, other than Woelke, and by each of them, and by other persons engaged in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced, and restrained Vanguard and its subcontractors, other than Woelke, and each of them, and other persons engaged in commerce or in industries affecting commerce.

24. An object of the acts and conduct of Respondent 944 set forth in paragraphs 10, 12(b), and 20 above, has been, and is, to force or require Woelke to enter into or affirm an agreement prohibited by Section 8(e) of the Act.

25. An object of the acts and conduct of Respondent 235 set forth in paragraphs 10, 12(a) and 12(c), 15, 16, and 21 through 23 above, has been, and is, to force or require Woelke to enter into or affirm an agreement prohibited by Section 8(e) of the Act.

26. Objects of the acts and conduct of Respondent 235 set forth in paragraphs 15, 16 and 23 above, has been, and is, to force or require Vanguard to cease doing business with Woelke or to force or require the subcontactors of Vanguard at the Columbia jobsite to cease doing business with Vanguard in order to compel Vanguard to cease doing business with Woelke.

27. By the acts and conduct set forth in paragraphs 10, 12(b), 20, and 24 above, Respondent 944 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

28. By the acts and conduct set forth in paragraphs 10, 12(a) and 12(c), 15, 16, 21 through 23, and 25 above, Respondent 235 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

29. By the acts and conduct set forth in paragraphs 15, 16, 23, and 26 above, Respondent 235 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

30. By the acts and conduct set forth in paragraphs 11, 12(b), 19(a) and 19(b) above, Respondent 944 has interfered with and restrained, and is interfering with and restraining, Woelke in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

31. By the acts and conduct set forth in paragraphs 11, 12(a) and 12(c), and 18(a) and 18(b) above, Respondent 235 has interfered with and restrained, and is interfering with and restraining, Woelke in the selection of its representatives for the purposes of collective bargaining or the

adjustment of grievances, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

32. The acts of Respondents described in paragraphs 10 through 31 above, occurring in connection with the operations of the employers and persons described in paragraphs 5 through 7 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

33. The acts of Respondents set forth above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B), Section 8(b)(4)(i), (ii)(A) and (B), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 19th day of October 1977, at 10 a.m., PDT, in hearing Room 2109, City National Bank Building, 606 South Olive Street, Los Angeles, California, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above consolidated complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as Amended, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the

National Labor Relations Board, an original and four copies of an answer to said consolidated complaint within 10 days from the service thereof and that unless they do so all of the allegations in said consolidated complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondents shall serve a copy thereof on each of the other parties.

DATED at Los Angeles, California, this 23rd day of September 1977.

/s/ Wilford W. Johansen
Wilford W. Johansen,
Regional Director
National Labor Relations Board
Region 21
606 South Olive Street, 24th Floor
Los Angeles, California 90014

(Text of Service List Omitted in Printing)

ITEM 2.

Stipulation of Facts With Designated Exhibits.

United States of America Before the National Labor Relations Board, Washington, D. C.

(Title omitted in printing)

IT IS HEREBY STIPULATED by and among Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Respondent 944; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called Respondent 235, and collectively called Respondents; Woelke & Romero Framing, Inc., Charging Party, herein called Woelke; and Counsel for the General Counsel of the National Labor Relations Board as follows:

1. The charges in Cases Nos. 21-CB-6196 and 21-CC-1922 were filed by Woelke on August 11, 1977, and copies thereof were served on Respondents on the same date by registered mail.

2. Respondents are, and each of them is, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material herein, Joseph Eickholt, herein called Eickholt, has been, and is now, a representative of Respondents, acting on their behalf, and at all times material herein has been, and is now, an agent of Respondents within the meaning of Section 2(13) of the Act.

4. (a) Vanguard Builders, Inc., herein called Vanguard, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in Southern California as a general contractor. At all times material herein, Vanguard has been engaged as the general contractor on construction projects located at Co-

lumbia and Main Streets, Riverside, California, herein called the Columbia jobsite, and at Lynwood and Rockford Avenue, San Bernardino, California, herein called the Rockford jobsite.

(b) Birth Development Company, Inc., herein called Birth, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in Southern California in the construction and sale of single-family residences. At all times material herein, Birth has been engaged in the construction of a single-family residence tract located at Alessandro Boulevrd and Via Vista in Riverside, California, herein called the Alessandro jobsite.

(c) Woodhaven Developers, Inc. dba Woodhaven Enterprises, herein called Woodhaven, is now, and at all times material herein has been, a corporation engaged in the building and construction industry in Southern California as a general contractor. At all times material herein, Woodhaven has been engaged as the general contractor in the construction of a single-family residence tract located at Lincoln and Mary Streets in Riverside, California, herein called the Lincoln jobsite.

5. (a) Woelke, with a place of business located in San Bernardino, California, is engaged in the building and construction industry in Southern California specializing in framing. At all times material herein, Woelke has been engaged, pursuant to subcontracts with Vanguard, Birth, and Woodhaven, in framing work at the Rockford and Columbia jobsites, at the Alessandro jobsite, and at the Lincoln jobsite, respectively.

(b) During the normal course and conduct of its business operations described in paragraph 5(a) above, Woelke annually purchases and receives goods and products valued in excess of $50,000 from suppliers located within the State

of California, each of which purchases and receives said goods directly from suppliers located outside the State of California.

(c) Woelke is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a person engaged in commerce and in an industry affecting commerce within the meaning of Section 8(b)(4)(i), (ii)(A) of the Act.

6. Vanguard, Birth, and Woodhaven are, and each of them is, and have been at all times material herein, persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i), (ii)(A) of the Act.

7. (a) At all times material herein, Respondents, and each of them, have been engaged in a labor dispute with Woelke.

(b) At no time material herein have Respondents, or either of them, been engaged in a labor dispute with Vanguard or any of its subcontractors other than Woelke, or with Birth or any of its subcontractors other than Woelke, or with Woodhaven or any of its subcontractors other than Woelke.

8. Woelke has been party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions, including Respondents, in the eleven Southern California counties since July 5, 1974, by virtue of the execution on that date of a Memorandum Agreement with Respondent 944. That agreement, by its terms, was due to expire on or about June 15, 1977. A copy of that agreement is attached hereto as Exhibit A. A copy of the Carpenters Master Labor Agreement (MLA) is attached hereto as Exhibit B.

9. From on or about June 3, 1977, to on or about August 4, 1977, Respondents, through Eickholt, pursuant to notice, engaged in six collective-bargaining sessions with Woelke for the purpose of negotiating a successor collective-bargaining agreement. On or about August 4, 1977, Respondents and Woelke agreed that further negotiations should be postponed indefinitely since Respondents and Woelke agreed that they had reached impasse over Respondents' demand for and Woelke's refusal to agree to the following:

(a) Respondents' proposal for no grievance and arbitration machinery;

(b) Respondents' industry advancement fund proposal;

(c) Respondents' proposal to include within the unit of employees whom Respondents will represent for purposes of collective bargaining, foremen of Woelke who do not regularly perform bargaining unit work and who are supervisors within the meaning of Section 2(11) of the Act and who are also Woelke's selected representatives for purposes of collective bargaining or adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act;

(d) Respondents' subcontracting proposal which included all the provisions of Article I, paragraph 103 and all its subparts, set forth below in Exhibit E attached hereto;

(e) Duration of the contract.

10. Since August 4, 1977, no further collective-bargaining sessions have been held, and neither Respondents nor Woelke has requested further negotiations. A copy of the initial contract proposals of Respondents is attached hereto as Exhibit C; a copy of the initial contract proposals of Woelke is attached hereto as Exhibit D; and a copy of the counterproposals of Respondents is attached hereto as Exhibit E.

11. In furtherance and support of Respondent's aforementioned labor disputes with Woelke and Respondents' demands for the contract provisions described in paragraph 9 above:

(a) Respondent 235 picketed at the Columbia jobsite commencing on or about August 10, 1977, with picket signs reading as follows:

Information
WOELKE
&
ROMERO
Operating
NONE [sic]
UNION
Carpenters

(b) Respondent 944 picketed at the Rockford jobsite commencing on or about August 28, 1977, with picket signs identical to those described in paragraph 11(a) above.

(c) Respondent 235 picketed at the Alessandro jobsite commencing on about September 21, 1977, with picket signs identical to those described in paragraph 11(a) above.

(d) Respondent 235 picketed at the Lincoln jobsite commencing on or about October 5, 1977, with picket signs identical to those described in paragraph 11(a) above.

12. As a consequence of the acts and conduct of Respondent 235 set forth in paragraphs 8, 9, 10, and 11 above, individuals employed by various subcontractors of Vanguard and Birth, have engaged in work stoppages and refusals to perform services for their respective employers at the Columbia jobsite and Alessandro jobsite.

13. The majority of carpenters working in employment covered by the Master Labor Agreement work for more than

one covered employer in a calendar year, and work for numerous covered employers in the course of their careers.

14. At all times material herein, the phase of jobsite construction work involving framing work has been considered and accepted by management and building trade union construction persons as work within the accepted and historic jurisdiction of the carpenters unions within Southern California and throughout the United States. At all times during the period of a collective-bargaining relationship and a series of collective-bargaining agreements since 1941, and prior thereto, contractors have employed workmen as carpenters under the respective collective-bargaining agreements with carpenters unions in Southern California and carpenters have historically performed framing work.

15. The contractor associations signatory to the series of collective-bargaining agreements in the 11 Southern California Counties with the Southern California Conference of Carpenters have adopted a consistent policy and understanding and interpretation of the collective-bargaining agreements that framing work is considered as carpenters work, and within the scope and coverage of the series of collective-bargaining agreements between the contractors associations and the carpenters unions.

16. In practice, contractors signatory to the Carpenters' Master Labor Agreement comply with the obligation to either (1) hire carpenters under the provisions of the Master Labor Agreement to perform framing work on jobsite, or (2) subcontract such work to contractors who are signatory to a collective-bargaining agreement with the Southern California Conference of Carpenters or their affiliated District Councils or local unions, and who hire carpenters under the provisions of the Master Labor Agreement, although from time to time, violations of that obligation do occur.

17. The District Councils within the 11 Southern California Counties and unattached Local Unions (Local Unions not affiliated with a District Council) formed a Southern California Conference of Carpenters in 1954. The Southern California Conference of Carpenters is the bargaining entity with the Contractor Associations in the Southern California Counties. The carpenter organizations affiliated with the Southern California Conference are the District Councils of Orange, San Bernardino, Riverside, Ventura, and unattached Local Unions in Imperial, Santa Barbara, San Luis Obispo, Kern, Inyo, and Mono Counties. Respondents are affiliated with the San Bernardino, Riverside, and Imperial District Council of Carpenters, and thereby are members of the Southern California Conference of Carpenters.

18. The Southern California Conference has signed a series of collective-bargaining agreements with Contractor Associations since 1954, and continuing to the present time.

19. The approximate number of carpenters engaged in construction work in the 11 Southern California Counties represented by the Southern California Conference and its affiliated District Councils and Local Unions are as follows:

1946 — 65,515	1965 — 69,153
1949 — 57,004	1970 — 62,385
1954 — 65,236	1975 — 66,287
1955 — 69,482	1977 — 65,931
1960 — 67,767	

20. There are 52 Carpenter Local Unions in Southern California who are affiliated with the Southern California Conference.

21. The employer parties to the Master Labor Agreement since prior to 1959, and continuing to the present, have been Associated General Contractors of California, Inc., herein called AGC, Building Industry Association of

California, Inc., herein called BIA, Underground Engineering Contractors Association, and Engineering and Grading Contractors Association, Inc., or their predecessors.

22. The number of contractors that are affiliated with AGC for the certain periods involved are as follows:

In 1959 — 545 members
In 1977 — 465 members

23. In 1959, the Building Contractors Association, a predecessor of BIA, had approximately 300 signatory members, and in 1977, the BIA had 400 signatory members to the Master Labor Agreement.

24. In addition to contractors being signatory to the Carpenters Master Labor Agreement by virtue of membership in the signatory Associations, the Southern California Conference of Carpenters is signatory with a number of contractors who are considered independents and not members of any of the Associations. Such contractors have executed short-form agreements, which agreements have been in use since at least prior to 1959, and continue to be used at the present time. Such short-form agreements bind the parties to the Master Labor Agreement as well as the specific provisions of the short-form.

25. Since prior to 1959, and to the present, approximately 4,000 contractors have signed some form of short-term agreement with the Southern California Conference of Carpenters.

26. From 1941 to 1954, the practice in Southern California was for the Building and Construction Trades Council and all of the building trades affiliated unions, both basic craft and subcraft unions, to enter into a Master Labor Agreement covering all such crafts and contractors performing construction jobsite work in Southern California.

27. In approximately 1954, the various subcrafts broke away from the one Basic Agreement and entered into separate collective-bargaining agreements with contractors employing subcrafts. As of 1954-1957, some of the basic crafts broke away from the one agreement and entered into separate collective-bargaining agreements. In 1957, and in subsequent years up to the present time, the Carpenters Unions entered into their own negotiations and separate collective-bargaining agreements with contractor associations and individual contractors.

28. During the collective-bargaining sessions between Woelke and Respondents, Respondents insisted that Woelke agree to the same subcontracting provisions as had been previously agreed to by the Southern California Conference of Carpenters and the contractor associations who negotiate the Carpenters' Master Labor Agreement. At no time did Respondents, during those collective-bargaining sessions, express any other reason for their insistence on such provisions.

29. The record in this case shall include the Motion to Transfer Proceedings to the Board, this Stipulation of Facts and all exhibits included herein, and the following documents are attached hereto as General Counsel's Exhibit No. 1, which is as follows:

(a) Original charge in Case No. 21-CB-6196, dated August 11, 1977.

(b) Notice of Filing of Charge of 1(a), dated August 11, 1977, with one return receipt attached.

(c) Notice of Filing of Charge of 1(a), dated August 11, 1977, served on September 21, 1977, with one return receipt attached.

(d) Original charge in Case No. 21-CC-1922, dated August 11, 1977.

(e) Notice of Filing of Charge of 1(d), dated August 11, 1977, with two return receipts attached.

(f) Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, dated September 23, 1977, with Form NLRB-4668 attached.

(g) Affidavit of Service of 1(f), dated September 23, 1977, with five return receipts attached.

(h) Respondents' answer to consolidated complaint, dated October 3, 1977, with proof of service attached.

(i) Letter from counsel for Respondents, dated October 13, 1977, requesting continuance of hearing.

(j) Order Denying Continuance, dated October 14, 1977.

(k) Affidavit of Service of 1(j), dated October 14, 1977, with two return receipts attached.

30. The record, as set out in paragraph 29 above, shall constitute the entire record in this proceeding before the National Labor Relations Board and shall be submitted directly to the Board for decision. All exhibits are submitted in duplicate herewith.

31. This Stipulation of Facts is entered into by the parties to this proceeding for the purpose of this proceeding only. No party hereto waives any objection it may have as to the relevancy, materiality, or competency of any of the facts stated herein, or the exhibits attached hereto.

Respectfully submitted,

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF

Dated at Los Angeles, California, this 19th day of October 1977.

By /s/ Lawrence Rosenzweig
Lawrence Rosenzweig
Counsel for Respondents
CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

TYRE & KAMINS

Dated at Los Angeles, California, this 19th day of October, 1977.

By /s/ John W. Prager, Jr.
John W. Prager, Jr.
Counsel for Charging Party
WOELKE & ROMERO FRAMING, INC.

Dated at Los Angeles, California, this 19th day of October, 1977.

By /s/ Andrew J. Stites
Andrew J. Stites
Counsel for the General Counsel
National Labor Relations Board

(For the Printing of the Joint Appendix, the Parties have included the following portions of the Exhibits Attached to the foregoing Stipulation of Facts)

MASTER LABOR AGREEMENT

Between

SOUTHERN CALIFORNIA
GENERAL CONTRACTORS

and

UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS
OF AMERICA

THIS AGREEMENT entered into this 27th day of July, 1974 by and between the Associated General Contractors of California, Inc., The Building Industry Association of California, Inc., The Engineering and Grading Contractors Association, Inc., and The Underground Engineering Contractors' Association, on behalf of their respective members, hereinafter referred to as the CONTRACTORS; and the District Councils and Local Unions in the Eleven Southern California Counties affiliated with the United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as the UNION.

The Contractors are engaged in construction work in Southern California and, in the performance of their present and future contracting operations, are employing and will employ workmen under the terms of this Agreement. The Contractors want to be assured of their ability to procure workmen for the work covered by this Agreement in the area hereinafter defined in Article I, in sufficient number and with sufficient skill to assure continuity of work in the completion of their construction contracts. The Union and

the Contractors, by this Agreement, intend to establish uniform rates of pay, hours of employment and working conditions for the employees covered by this Agreement.

ARTICLE I

Coverage

101. THIS AGREEMENT shall apply to and cover all employees of the Contractors, including Developers, Builders or Construction Managers, within the territory as described in this paragraph employed to perform or performing construction work within the jurisdiction of the Union, as such employees and construction work are respectively defined hereafter in this Article and Articles II and XI of this Agreement in the area known as Southern California and more particularly described as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo and Kern.

101.1 THIS AGREEMENT is made for and on behalf of, and shall be binding upon all eligible persons, firms or corporations who at the time of execution of this Agreement are, or during the term hereof become eligible members of the Associations which members are individual employers of Carpenters in the above mentioned areas.

101.1.2. Each individual Contractor whether corporate, or other legal entity, or its successor, shall be liable under, subject to and bound by the Agreement. It is agreed that the wages, hours and working conditions of this Agreement are the wages, hours and working conditions in the area covered by the Agreement.

101.2. This Agreement is separate and distinct from and independent of all other Agreements entered into between the Union and other Contractor organizations irrespective of any similarity between this Agreement and any such other Agreements, and no acts or things done by the

parties to such Agreements or notices given pursuant to the provisions hereof, shall change or modify this Agreement or in any manner affect the contractual relationship of the parties herein, except as otherwise provided in paragraph 901.

102. All work performed in the Contractor's warehouses, shops or yards which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement and all of the production or fabrication of materials by the Contractor, or subcontractor, for use on the project shall be subject to the terms and conditions of this Agreement.

103. The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

103.1. A subcontractor for the purposes of this Agreement, with the exception of the general provision immediately above, is defined as any person, firm or corporation holding a valid State Contractors' License and agrees under contract in writing with the Contractor or in writing with his subcontractors to perform any work covered by this Agreement, and employs workmen as employees to perform services covered by this Agreement, including the performance of labor, and/or furnishing or installation of material, or the operation of equipment. All employees of subcontractors will perform work at the appropriate hourly rate and

will be reported to such trust funds as required by the Agreement.

103.2. All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.3. If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement.

103.4 The Contractor shall provide in his contract with the subcontractor the following provision:

"The subcontractor accepts and agrees to be bound by the procedures for settling jurisdictional disputes as set forth in Article III, paragraph 304, 305, and 306 of the Master Labor Agreement between Southern California General Contractors and the United Brotherhood of Carpenters and Joiners of America. The subcontractor agrees that he will bind his subcontractors to said procedures in the same manner and to the same effect as provided with respect to him."

103.5. The Trustees of the Trust Funds shall furnish the Contractor Associations and the Union with a list of delinquent contractors each month. The Contractor agrees he will not subcontract any portion of his job to any subcontractor whose name appears on the delinquent list until such subcontractor has paid all delinquent monies to the various Trust Funds. In the event the Contractor subcontracts to any such delinquent subcontractor, in violation of

the foregoing, the Contractor shall remove such subcontractor from the job immediately, unless such delinquent subcontractor immediately makes full payment for all delinquencies to the Trusts. The Trustees may require the individual Contractor with a record of past delinquencies under any name or entity to post a cash deposit in the amount equivalent to an estimated two months contribution. Such cash deposit shall be deposited with a custodian designated by the Administrative Office of the Trust Funds within ten (10) days of the notice to the Contractor from the Trust requiring the Contractor to post the cash deposit. The cash deposit shall be posted as security for payment of contributions to any trust fund established by this Agreement. The failure of said individual Contractor to post such a cash deposit shall be considered a violation of this Agreement and the Union shall have the right to take economic action, including but not limited to the right of withholding services of carpenters, refusal to dispatch carpenters, and strike action against such a Contractor.

103.5.1. The Contractor shall be financially responsible for all fringe benefits owed to any funds established by this Agreement by him or his subcontractor or the subcontractor of his subcontractor for work performed on the Contractor's job or project in accordance with the requirements set forth below.

103.5.2. The term "contractor", for delinquency purposes only, shall include all entities of the delinquent contractor, change of name, or change of entity, provided that the delinquent contractor holds at least 10% ownership in the new entity.

103.5.3. The Trust Office shall notify the Contractor of any delinquency of any subcontractor within 90 days of the date the delinquency first occurred and in no case shall the Contractor be liable for fringe benefit contributions of

a subcontractor for more than 90 days prior to the date the Trust Office notice is sent to the Contractor.

103.5.4. Where a Contractor contracts with a listed delinquent subcontractor or subcontractors, the Contractor may terminate the subcontract of such delinquent subcontractor, or subcontractors. The Contractor shall become financially responsible for the liability on that job from the commencement of the work under the subcontract to the date of termination of that subcontract.

103.5.5. Where the General Contractor fails or refuses to make any payments required under the above provisions, and the Trust has established the delinquent amount, the Union shall have the right to withhold service from any or all jobs of such General Contractor.

103.5.6. Where there is no General Contractor on the jobsite, the right to withhold service by the Union shall apply to the project as a whole.

103.5.7. The Trust Office shall send delinquency notices to Contractors whose contributions are not paid as required. The Trust Office shall notify the Union of those Contractors who fail to pay within five days of such notice and the Union shall within 48 hous after receipt of such notice withhold service from the Contractor involved until contributions are paid or satisfactory arrangements made with the Trustees for payment. In cases where the Union does not withhold service as required, written notice and the reason for such failure shall be submitted to the delinquency committee of the Trustees and the delinquency committee of the Trustees shall have authority to establish rules for exception.

103.5.8. If a Contractor or subcontractor is sent a second 48-hour delinquency notice within a 12-month period, the Trustees shall require such Contractor or subcontractor

to post a cash deposit with the Trust equal to one month's contribution computed on the basis of the average monthly contributions made during the three months' period which constitute the highest contributions during the previous 12 months.

103.5.9. The Trust Office shall issue delinquency notices and clearances to Contractors confirmed in writing.

103.5.10. All carpenter employees shall be covered by this Agreement and the provisions applicable to Trust Funds. The Trustees shall have authority to audit Contractor records to determine the appropriate contributions and shall have specific authority to examine the Contractor's Federal W-2 Forms and 1099 Forms and his Quarterly State Tax Returns.

103.5.11. Each individual Contractor found to be delinquent may be required to pay for all legal fees, court costs, and auditing costs in connection with such delinquency. Liquidated damages in the amount of twenty-five dollars ($25.00) or ten percent (10%) of the amount due, whichever is greater, may also be assessed.

103.5.12. For the purposes of this Agreement, delinquency in failure to make the required reports and contributions to the Trust Fund as determined by the Trustees, shall consist of the following:

a. Failure to submit trust report forms.
b. Failure to report on all employees.
c. Failure to make the payments as required on time.
d. Failure to pay audit amounts, audit fees and other costs and damages as determined by the Trust.
e. Failure of bank to honor checks submitted.
f. Failure to post cash deposit upon demand of the Trustees in accordance with the above provisions.

104. The Contractor or his subcontractors shall have freedom of choice in the purchase of materials except that every reasonable effort shall be made by the Contractor and subcontractors to refrain from the use of materials or products which will tend to cause any discord or disturbance on the project.

105. The scope of the work covered by this Agreement includes all work performed on the construction jobsite which is within the recognized jurisdiction of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and shall include such jobsite work in connection with new methods of construction or the use of materials or products innovated or developed during the term of this Agreement. The Contractor agrees that all such work shall be performed under the terms and conditions of this Agreement by employees of the Contractor or his subcontractors.

105.1. The Contractor shall construct all wood panel forms to be used on the jobsite for a specific project and such work shall be performed only by Carpenters under the terms of this Agreement.

105.1.1. The Contractor may subcontract such work on wood panel forms in accordance with the terms of this Agreement; provided that such work by a subcontractor shall be performed by Carpenters under the terms of this Agreement. A Contractor, party to this Agreement, may construct such wood panel forms away from the jobsite, and in that event, such work shall be performed under the terms of this Agreement only by Carpenters that are employees of the Contractor.

105.1.2. Any wood panel forms that are constructed by the Carpenters under the provisions of paragraph 105 may be reused on any jobsite by any Contractor.

105.1.3. Any modifications of wood panel forms shall be performed only under the provisions of paragraph 105.

105.1.4. The provisions of paragraph 105 shall not apply to identifiable standard manufactured commercial brand-name forms such as UNIVERSAL, SYMONDS or similiar type forms.

105.1.5. Except as provided otherwise in this Article, the Contractor may subcontract work; provided that any subcontractor who performs jobsite work shall be required to perform such work and only by carpenters under the terms of this Agreement.

106. Repairs necessitated by defects of material or workmanship or adjustments of newly purchased and/or installed equipment or machinery will not be subject to this Agreement when such repairs and/or adjustments are made by the manufacturers thereof or his agents or employees pursuant to the terms of a manufacturer's guarantee and the Union will not hamper such manufacturer or his agents or employees on such exempted work.

107. Definitions.

107.1. The term *Contractor(s)*, as used herein, shall refer to an employer party to this Agreement, and developers, builders or Construction Managers who enter into agreements with subcontractors.

107.2. The term *Association*, as used herein, shall refer to The Associated General Contractors of California, Inc., the Building Industry Association of California, Inc., the Engineering and Grading Contractors Association, Inc., and the Underground Engineering Contractors' Association.

107.3. The term *Union*, as used herein, shall refer to the District Councils and Local Unions in Southern California affiliated with the United Brotherhood of Carpenters and Joiners of America and more particularly described as

the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern.

107.4. The term *Workman or Workmen*, as used herein, shall refer to a person or persons in the labor market who are not employed.

107.5. The term *Employee(s)*, as used herein, shall refer to the employed person, or persons.

ARTICLE II

Union Recognition

201. The Contractor hereby recognizes the Union as the sole and exclusive collective bargaining representative of all employees and persons employed to perform work covered by this Agreement. It is understood that the Union does not at this time, nor will it during the term of this Agreement, claim jurisdiction over the following classes of employees: executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman. Employees and persons employed to perform work covered by this Agreement specially include Craft Foreman. A superintendent shall not use working tools.

202. The Union recognizes the Associated General Contractors of California, Inc., the Building Industry Association of California, Inc., the Engineering and Grading Contractors Association, Inc., and the Underground Engineering Contractors' Association as the sole and exclusive bargaining representatives for their respective members, present and future, who are or who become bound by this Agreement and agrees that during the term of this Agreement it will not negotiate or enter into any agreement with such

individual members of the Association relative to part or all of the subject matter covered by this Agreement.

203. This Agreement shall be binding upon each and every eligible member of the Associated General Contractors of California, Inc., the Building Industry Association of California, Inc., the Engineering and Grading Contractors Association, Inc., and the Underground Engineering Contractors' Association with the same force and effect as if this Agreement were entered into by each member individually. All eligible members of the Associated General Contractors of California, Inc., the Building Industry Association of California, Inc., the Engineering and Grading Contractors Association, Inc., and the Underground Engineering Contractors' Association, shall remain jointly and severally liable under this Agreement for the term of the Agreement irrespective of whether any member shall resign or be suspended from any of the Associations prior to the expiration date of this Agreement, and such liability shall survive the termination or suspension of membership and remain in force during the term of this Agreement; provided, however, that as to such former or suspended members the provisions of Article III and Article V shall not apply from the time when such member resigns or is suspended from any of the Associations. However, they remain bound by the provisions of paragraph 103.5 through and including paragraph 103.5.12, and Articles XV, XVI, XVII, XVIII and XIX. Such former or suspended member shall be bound by any renewals or extensions of this Agreement, unless he gives the appropriate Association and the Union at least sixty days' written notice prior to June 15, 1977 or June 15th of any subsequent year, of his intent not to be bound by any new or renewed agreement. The Associations will advise the Union of any new or resigned or suspended mem-

bers within seven days after admission to membership or change in membership status.

204. In the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions subject to the conditions of paragraph 201 shall govern:

204.1. The Local Unions shall establish and maintain open and non-discriminatory employment lists for the use of workmen desiring employment on work covered by this Agreement and such workmen shall be entitled to use such lists free of charge.

204.2. The Contractors shall first call upon the Local Union having work and area jurisdiction for such men as they may from time to time need, and the respective Local Union shall furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors strictly in accordance with the provisions of this Article.

204.3. It shall be the responsibility of the Contractors, when ordering men, to give the Local Union all of the pertinent information regarding the workman's employment.

204.4. The Local Union or District Council will dispatch in accordance with the request of the Contractor each such qualified and competent workmen from among those entered on said lists in numerical order to the Contractor by the use of a written referral in the following order of preference and the selection of workmen for referrals to jobs shall be on a non-discriminatory basis.

204.4.1. Workmen specifically requested by name who have been employed, laid off or terminated as Carpenters in the geographic area of the Local Union or District Council, as the case may be, within three years before such

request by a requesting individual employer now desiring to reemploy the same workmen, provided they are available for employment.

204.4.2. Workmen who, within the five years immediately before the Contractor's order for men, have performed work of the type covered by this Agreement in the geographic area of the Agreement, as defined in paragraph 101, provided such workmen are available for employment.

204.4.3. It is agreed that in connection with the preference outlined in subparagraph 204.4.2 up to 25% of the employees, excluding foremen, employed to perform work covered by this Agreement on any project may be employees designated by the individual employer. In case of reduction in force, foremen shall not replace other employees on the job, except that two foremen may be retained at all times.

204.4.4. Workmen whose names are entered on said lists and who are available for employment.

205. When ordering workmen of the skills required, the Contractor will give notice to the Local Union not later than 2:30 P.M., of the day prior (Monday through Friday) or, in any event, not less than 17½ hours before the required reporting time, and in the event that 48 hours after such notice the Local Union shall not furnish such employees, the Contractor may procure employees from any other source or sources. If men are so employed, the Contractor shall immediately report each such employee by name to the Local Union having work and area jurisdiction.

205.1. No employee or applicant for employment will be required as a condition of employment or continued employment to take any test or sign a waiver of lien.

206. Employees employed by one or more of the Contractors for a period of 8 days continuously or accumulatively shall be or become after the 8-day period, or 8 days

after the effective date of this Agreement, whichever is later, members of the Union and shall remain members of the Union as a condition of continued employment. Membership in the Union shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership to the Union.

206.1. The individual Contractor shall not be required to discharge any employee pursuant to this section until a written notice from the Union of such employee's non-compliance with this section, stating all pertinent facts showing such non-compliance, shall have been served upon such individual Contractor.

207. Subject to the foregoing, Contractors shall have complete freedom of selectivity in hiring and Contractors retain the right to reject any job applicant referred by the Union for any reason. Contractors may discharge any employee for just cause, provided there shall be no discrimination on the part of the Contractors, against any employee, for activities in behalf of, or representation of, the Union not interfering with the proper performance of his duties.

207.1. The individual Contractor may discharge any employee for just cause only. Disputes shall be subject to the grievance and arbitration provisions of this Agreement. The arbitrator or Joint Adjustment Board shall be free to sustain the discharge or to find discipline other than discharge to be appropriate and may order reinstatement with full or partial back pay as he or it deems appropriate.

208. The Contractor may transfer employees who are on the Contractor's payroll at the time transfer is made within the area of a District Council without limitation. Additional employees shall be employed in accordance with the provisions of Article II, paragraph 204.4.

208.1. Employees employed by any Contractor pursuant to the terms of this Agreement, and remaining in good standing in the Union, shall not be removed or transferred by the Union unless the prior approval of the Contractor has been obtained.

* * *

ARTICLE IV
Classifications

401. Should the Contractor or subcontractors, as defined in Article I, paragraphs 103 and 107, employ employees in the prosecution of work covered by this Agreement in occupations or upon equipment which is not covered by one of the classifications herein specified, such employment shall, within three working days after a work assignment is made or the equipment is operated, be temporarily classified by the Contractor Association and the Union under the classifications contained herein which will more nearly fit the particular character of the employment. Temporary classifications and wage rates shall be immediately referred to the Joint Adjustment Board which shall, at its next meeting, review and recommend usage of the proper classifications and wage rates. Either party shall thereafter have the right to submit a dispute under this section in the manner set forth in Article V.

402. The number of employees and the number of classifications of employees required to perform any operation covered by this Agreement shall be determined by the Contractor; provided that if a Contractor, in determining the number of employees or the number of classifications of employees, shall lessen the number of employees or the number of classifications customarily used to perform any such operation, the Union may have the issue of such reduction in employees or in classifications determined by the

grievance and arbitration procedure provided in Article V of this Agreement. In determining such disputes, consideration shall be given to the necessity for additional employees or classifications as well as to other pertinent factors.

403. Because the Contractor and the Union recognize the necessity of eliminating restrictions on production and promoting efficiency, nothing shall be permitted that restricts production or increases the time required to do the work, and no limitation shall be placed upon the amount of work which an employee shall perform, nor shall there by any restrictions against the use of any kind of machinery, tools, or labor-saving devices, provided, however, that such machinery or power equipment shall be furnished by the Contractor, and provided further that no employee shall be required to work under any conditions that are injurious to his health or safety in conflict with a present well-established custom regulating such use where the work is being performed.

404. The Contractor agrees to recognize and observe craft jurisdiction insofar as possible and practicable and that wage scales apply to classifications rather than to men, and the Union agrees to permit the occasional or temporary transfer of employees of one classification to any other classification or between crafts; provided that, when such transfers are made the employee shall be paid for the entire day on the basis of the rate of the highest paid classification in which he worked during the day. Abuse by any Contractor of the privilege granted in this paragraph 404 shall subject him to withdrawal of the privilege for an appropriate period through the procedures established in Article V.

405. Each employee employed in accordance with the terms of this Agreement shall receive the minimum hourly wage rates specified in Article XVI. Any other method of

paying employees, such as the use of piecework, bonus systems, quota setting, or lumping of the work, shall be deemed a violation of this Agreement. Grievances shall be settled in accordance with Article V of this Agreement.

406. The Contractor recognizes those sections of the Constitution and Laws of the United Brotherhood of Carpenters.

* * *

ARTICLE XIII
Working Rules

1301. The following working rules shall govern the employment of employees performing any work covered by the terms of this Agreement in the area of Southern California as described in paragraph 101 of this Agreement.

1302. SINGLE SHIFT:

1302.1. Eight consecutive hours, exclusive of lunch period, between 8:00 A.M. and 5:00 P.M., shall constitute a day's work. Forty hours, Monday 8:00 A.M. through Friday to 5:00 P.M. shall constitute a week's work.

1302.2. All time worked in excess of eight consecutive hours, exclusive of lunch period, or all time worked in excess of forty straight-time hours per week and all time worked before 8:00 A.M. and after 5:00 P.M. and all work performed on Saturdays; Sundays and Holidays shall be paid at the overtime rate, except as otherwise provided for in this Article.

1302.3. For a period of not less than five consecutive working days, the Contractor may deviate the starting time of the complete job from 8:00 A.M. to 7:00 A.M. for one of the following reasons:

1302.3.1. Desert heat and/or wind, traffic conditions or similar conditions existing at the jobsite which impair the progress of the job.

1302.4. Written notification from the Contractor of deviation in starting time shall be received by the appropriate District Council, or where there is no District Council, the Local Union having jurisdiction, not less than twenty-four hours prior to the starting date of deviation and shall contain the following information: Address of job, starting deviation hour, starting time for deviation, reason for deviation, approximate ending date of deviation.

1302.5. The Contractor may deviate the starting time of the complete job to 7:30 A.M. for not less than five consecutive working days for any reason. The Contractor shall notify the appropriate District Council, or where there is no District Council, the Local Union having jurisdiction, by telephone, provided the telephone notification is confirmed, in writing, within twenty-four hours; the written notice to provide the address of the job and approximate duration of the deviation and provided further, that, upon change of the starting time to the regular 8:00 A.M. starting time, the Contractor shall again notify in writing, the appropriate District Council, or, where there is no District Council, the appropriate Local Union having jurisdiction, of the change from the approved deviation in the starting time.

1302.6. Overtime rates shall not be paid for work performed before 8:00 A.M., Monday through Friday, on jobs where deviation in shift-starting time is in compliance with the provisions contained in paragraph 1302.3, 1302.4 and 1302.5 of this Article.

1302.7. In the event a Contractor fails to give proper notice to the Union of a deviation in starting time, the Contractor shall be considered in violation of the Agreement and shall be required to pay proper overtime for all time worked prior to 8:00 A.M.

1303. MULTIPLE SHIFTS:

1303.1. When so elected by the Contractor, multiple shifts may be worked for five or more consecutive days, provided that the Union is notified 24 hours in advance of the effective date of the starting of such multiple-shift operations.

1303.2. Contractors shall have the right to designate the craft or crafts on any project or portion thereof who shall work on a multiple-shift basis; provided, however, that men working on multiple shifts shall not be interchangeable with those working on a single-shift basis. In no event shall the regular working hours of separate shifts overlap, nor shall any interval between shifts exceed the reasonable time necessary to change shifts and in no event shall such interval exceed one hour.

1303.2.1. It is understood that a single and a multiple shift may work concurrently on a project.

1303.3. If the Contractor elects to work the day shift between 8:00 A.M. and 5:00 P.M., that shift shall work eight consecutive hours exclusive of meal period. Second or third shifts shall work seven consecutive hours exclusive of meal period, for which working time employees on each shift shall receive eight hours' pay at straight-time rates, Mondays through Fridays.

1303.4. The Contractor may regulate the starting time of the two-shift operation to permit the utilization of daylight hours by starting the first shift prior to 7:00 A.M. and each shift shall work seven and one-half consecutive hours exclusive of meal period, for which time employees on each shift shall receive eight hours' pay at the straight-time rate, Monday through Friday.

1303.5. On regular two or three-shift operations, the Contractor may deviate the starting time of the day shift by

the same procedure provided in paragraphs 1302.3, 1302.4 and 1302.5.

1303.6. It is agreed that the Contractors and the Union may mutually agree, in writing, upon different starting and quitting times for any of the shift arrangements provided in paragraphs 1302 and 1303.

1304. SHIFT OVERTIME:

1304.1. On a three-shift operation starting at 8:00 A.M. Monday, the 15th or Friday graveyard shift ending on or before 8:00 A.M. Saturday morning will be considered Friday work. The Saturday graveyard shift ending on or before 8:00 A.M. Sunday morning will be considered Saturday work. The Sunday graveyard shift ending on or before 8:00 A.M. Monday morning will be considered Sunday work.

1304.2. Any time worked from Friday midnight to Sunday midnight or on holidays or in excess of the regular shift hours shall be paid for at the applicable overtime rate, except as provided above. Overtime rates shall not be paid on shift premium pay.

1305. SPECIAL SHIFTS:

1305.1. When maintenance or remodeling work cannot be performed on the regular day shift because of the fact that establishments cannot suspend operating during the day a special single shift may be employed starting at 5:00 P.M., 5:30 P.M., 6:00 P.M. or 6:30 P.M., Monday through Friday, and employees on this shift will work seven consecutive hours exclusive of meal period, for which they will receive eight hours' pay at the straight-time rate.

1305.2. This provision may be applied to work other than maintenance and remodeling by mutual agreement, in writing, between the Contractor and the Union.

1305.3. It is agreed, however, in the operation of this shift, no employee will lose a shift's work. Any employee

working a total number of hours in excess of eight on this and any other shift during the 24-hour period shall receive the double-time rate for hours worked in excess of eight.

1305.4. Special conditions on a job brought about by prohibitions which are imposed on the hours of work by a public authority relating to public safety or other emergency public requirements shall allow the Contractor to perform work outside the regular shift hours and an employee shall work seven consecutive hours for which he shall receive eight hours' straight-time pay, Monday through Friday.

1306. Any employee working on Saturdays, Sundays or holidays shall be guaranteed four hours' pay at the appropriate overtime rate and if more than four hours are worked, the employee shall be paid for actual hours worked at the appropriate overtime rate.

1307. Any workman or employee reporting for work at the regular starting time for whom no work is provided shall receive pay for two hours at the stipulated rate and all fringe benefits for his classification for so reporting unless he has been notified before the end of his last preceding shift not to report; and any employee who reports for work and for whom work is provided shall receive not less than four hours' pay; and all fringe benefits for his classification and, if more than four hours are worked in any one day, shall receive not less than a full day's pay therefor, unless prevented from working for reasons beyond the control of the employer, including, but not limited by, such factors as inclement weather, or breakdown causing discontinuance of a major unit of the project during which time employees are not required or requested to remain on the project by the employer or his agent. Workmen or employees referred under Article II to the employers' jobs who arrive in an unfit condition to work, without proper tools, credentials, or who are not ready to go to work or who are not otherwise

qualified shall not be paid showup time, or subsistence. The employee shall furnish the employer with his current address and phone number, if any. The employer shall furnish the employee with the employer's current address and telephone number at the time of employment. Carpenters who voluntarily quit shall receive pay only for hours worked.

1307.1. All pay for work performed shall be reckoned by the day and one-half day.

1308. Employees shall travel to and from their work on their own time and by means of their own transportation.

1309. Subsistence:

1309.1. In the subsistence area as hereinafter defined in Exhibit "A" subject to exceptions noted below, subsistence shall be paid at the rate of fourteen dollars ($14.00) per scheduled work day effective May 1, 1974. There shall be no pro-rating of subsistence. Subsistence shall apply to workmen and/or employees who report to work and for whom no work is provided.

1309.1.1. Vandenberg Air Base and Point Arguello are included in the subsistence areas. Subsistence will not be payable unless the home of an employee or workman is over thirty (30) road miles from the center of the job or project located at Vandenberg Air Base or Point Arguello.

1309.2. Effective June 15, 1975, subsistence payments shall be increased to fifteen dollars ($15.00) per day.

Effective June 15, 1976, subsistence payments shall be increased to sixteen dollars ($16.00) per day.

1309.3. An employee or workman who is required to report or perform any work in a subsistence area for any portion of the day or shift shall receive the established subsistence rate for the entire day or shift.

1309.4. No subsistence need be furnished or paid in the following instances:

1309.4.1. When work performed on the job or project is located within the free zone designated in Exhibit "A".

1309.4.2. When the home of an employee, at the time a job is bid or commitment made on non-bid projects is located within thirty (30) road miles of the job or project which is located in the subsistence area.

1309.4.3. When an employee has been notified by the Contractor prior to his arrival at the jobsite not to report for work.

1309.4.4. When the work performed on the job or project is located within a fifty (50) mile radius of the City Hall of Bishop, California, effective July 1, 1974.

1309.5. Effective May 1, 1974, subsistence shall be paid at the rate of nineteen dollars ($19.00) per day in the Counties of Inyo and Mono and shall be increased thereafter as follows:

June 15, 1975, increased to $20.00 per day.

June 15, 1976, increased to $21.00 per day.

1309.6. Subsistence as provided in paragraphs 1309.1 and 1309.2 shall be paid on projects on the following offshore islands:

Richardson Rock	San Miguel Island
Santa Cruz Island	Santa Barbara Island
Arch Rock	San Clemente Island
San Nicholas Island	Santa Rosa Island
Santa Catalina Island	Anacapa Island (Channel Islands Monument)

1309.7.1. Employees reporting at the embarkation point for travel to the above named islands shall be paid travel time from the mainland to the islands and return at the straight-time rate and in no event shall the travel time be less than one (1) hour regardless of mode of travel. Travel

time shall start and end at the point of embarkation at the time and place designated by the Contractor.

1309.8. In lieu of subsistence, the Contractor may provide and maintain acceptable room and board on or immediately adjacent to the project seven (7) days per week in compliance with California State Laws.

1309.9. Hardwood Floor Workers and Shinglers shall receive subsistence payments when working beyond thirty (30) road miles from the Local Union from which they are cleared to the job notwithstanding that the job falls within the free zone of the Construction Carpenter.

1310. Employees shall not work more than five (5) consecutive hours without a one-half hour (½) meal period. When employees work over five hours without being provided with a one-half hour meal period, they shall receive one-half hour pay at the double-time rate. When an employee is required to work overtime for more than three (3) hours over the regular eight (8) hours, the employer agrees to provide a meal period and the employee shall have sufficient time to eat the meal without loss of pay. In the event an employee is required to work through an overtime meal period, then the employee shall receive pay for one-half hour at the double-time rate. Meal periods may be staggered so to meet job requirements.

1311. All wages must be paid weekly on the job. Each employee shall be paid prior to the end of his shift. When men are discharged, they must be paid wages due them at the time of discharge, in accordance with the California State Labor Code. When an employee quits, he must be paid wages due him in accordance with the California State Labor Code. Notwithstanding the grievance procedure in this Agreement, employees who are not paid in accordance

with the provisions of this paragraph 1311 only, may, if desired, appeal directly to the Labor Commissioner.

The Contractor shall be financially responsible for all wages owed to any workman for work performed on the Contractor's job or project, provided there has been an appropriate demand made in writing to recover said wages and a copy of such demand has been furnished to the Contractor.

The Union shall have the right to take any legal or economic action, including withdrawal of services, refusal to dispatch carpenters and strike action against any Contractor who fails to pay wages due. The Grievance and Arbitration procedure as set forth in this Agreement shall not apply to any issue or dispute concerning the non-payment of wages under this Agreement, unless the parties agree mutually to utilize such grievance and arbitration procedure.

1311.1. Should an employer knowingly or repeatedly compensate an employee with a check for which payment is refused by the employer's bank because of insufficient funds or should an employer fail to pay his employees on the regular, established pay day for his job, the obligation of the individual employer to the individual employee shall continue at the employee's regular straight-time rate for a period not to exceed forty hours, notwithstanding the above unless the refusal of payment by the bank is due to the bank's error or omission or to circumstances which are beyond the control of the individual employer and unless the individual employer's failure to pay his employees on the regular, established pay day for his job was due to circumstances which are beyond the Contractor's control. Furthermore, should an employer knowingly or repeatedly compensate an employee with a check for which payment is refused by the employer's bank because of insufficient funds, the employer will be required to issue only certified

checks for all employees working under this Agreement on that job for the duration of that job on which said check was issued. Any questions concerning responsibility of the individual employer or whether the omission is beyond his control shall be subject to the grievance procedure of this Agreement.

1311.2. An employer who fails to pay his employees on the regular established pay day for his job, shall be subject to the grievance procedure of this Agreement.

1311.3. All employees shall be notified ten (10) minutes in advance of termination and they shall be allowed the balance of the shift or half shift off to gather tools and personal belongings and shall be paid to the end of the shift or half shift.

1311.4. Upon termination by the Contractor, the employee shall be paid immediately in full. His pay status shall continue for each calendar day until pay received (not more than eight (8) hours pay shall be charged for any calendar day).

1312. The Contractor shall show the total straight-time and total overtime hours worked on each check stub or voucher. The Contract shall, effective upon the next printing of checks or vouchers, show his name and address on each check stub or voucher. Each individual employer shall provide with each payroll check an itemized check stub showing separately date of issuance, each deduction made for the payroll period covered by the check or a separate statement showing the name of the employee, the name and address of the individual employer, with each payroll check showing total hours and deductions made for the payroll period. There shall be no cash payment of any nature or kind whatsoever. Payment by cash or second or multiple checks or combination thereof or bonuses shall be prima facia evi-

dence of an attempt to violate the provisions of this Agreement.

1313. When the Union and the Contractors consider and agree that conditions in the industry in the area covered by this Agreement warrant a shortened workday or workweek, the parties shall jointly give adequate consideration and discussion of such changes; provided, however, that any such changes in the workday or workweek shall not be used to encourage the payment of overtime to a greater extent than that which is being paid at the time a change is made in the workday and workweek.

1314. The Contractor shall be responsible for the upkeep and sharpening of saws during the course of employment on the job by providing either saw-sharpening time or saw-sharpening service. It is understood that Carpenters at the beginning of employment shall have sharp saws.

1315. Carpenters and apprentices shall furnish their own tools, but shall not furnish, rent or lease saw horses, ladders, mitre boxes, electric drills, automotive equipment to be used for the purpose of hauling or delivering individual employer's material or equipment, or any kind of power-operated machines or saws. Each employee shall arrive on the job with tools in proper condition. To implement this section, the individual carpenter shall provide a tool box with a lock.

1315.1. The individual employer shall provide a secure place on each jobsite where his employees may keep their tools. If all or any part of the employee's tools are lost by reason of failure of the individual employer to provide such a secure place, or by fire, flood, or theft involving unlawful entry while in the secure place designated by the individual employer, the individual employer shall reimburse such employee for any such loss. The employee suffering said

loss shall report the loss during his next working day and the Contractor shall acknowledge liability or reject the claim within two working days after report of the loss or claim. Disputes resulting from this section shall be submitted to the grievance procedure as outlined in Article V.

1315.2. The Contractor shall furnish cool and potable drinking water in sufficient quantities for the need of the employees and make available sanitary drinking cups and salt tablets.

1316. In the event free parking facilities are not available within three blocks of a jobsite, the individual employer will provide such facilities and the individual employer shall have the right to designate parking areas to be used, where, because of congested parking conditions, it is necessary to use public facilities, the individual employer shall reimburse the employee for the cost of such parking upon being presented with a receipt or voucher certifying to the cost thereof, such reimbursement to be made on a weekly basis or at the conclusion of the project, whichever occurs earlier. In the event free parking facilities are not available within three blocks of the jobsite, designated parking areas shall be reasonably level and graded to drain.

1317. The Contractor shall not discharge or discriminate against an employee under this Agreement because of any industrial injury incurred prior to employment, or the filing of a claim for workmen's compensation benefits.

1317.1. When an employee is injured while at work to the extent of being unable to work for the balance of the day, he shall be paid for a full day at his regular rate. His ability to work or not to work shall be determined by a qualified physician.

1318. Not more than three members of the Contractors' firm (partnership, corporation or joint venture) shall work

with the tools of the trade. Any person working with the tools of the trade shall be covered by the terms and conditions of this Agreement, including the provisions of paragraph 206 and contributions to the Trust Funds to the extent such contributions are legally permissible and allowed by the Trust Funds.

1319. *Efficiency*—It is agreed that the Carpenters, through their Business Agents, use their efforts to encourage greater efficiency on the job and that they refrain from the solicitation of premium payments for employees represented by the Union. The employees and the Union shall use their efforts to encourage greater efficiency compatible with sound construction safety practices on the job.

1320. *Safety*—The Union shall cooperate (1) with the individual Contractor and with each other in carrying out all of the individual Contractor's safety measures and practices for accident prevention and (2) employees shall perform their duties in each operation in such a manner as to promote efficient operations of each particular duty and of any job as a whole. The individual contractors must post the name and address of their doctor and the compensation insurance carrier on the jobsite.

1320.1. All Federal and State Safety Rules, regulations, orders and decisions shall be binding upon the individual contractor and shall be applied to all work covered by this Agreement. No worker shall be required to work under unsafe conditions.

1320.2. The individual contractors shall be solely responsible for implementation and maintenance of such safety laws, rules, regulations, standards, orders and decisions. Neither the Union nor any Local Unions or District Councils are responsible for such implementation or maintenance.

1320.3. The Contractor will furnish for the use of his employees any necessary waterproof or foul weather gear, safety helmets, or any other necessary protective clothing as required by CAL-OSHA or the Contractor. Employees may be held monetarily responsible for such items properly checked out to them with the understanding that such items broken, worn out in normal use, or lost in a manner beyond the control of the employee are excluded.

* * *

ARTICLE XVI

Wage Scales for United Brotherhood of Carpenters and Joiners of America

1601. Effective July 1, 1974, all foremen not herein separately classified shall be paid not less than 75¢ per hour more than the hourly rate of the highest Carpenter's classification listed below over which they have responsibility, excluding the classification "Pneumatic Nailer or Power Stapler".

The following hourly wage rates shall apply:

CLASSIFICATION	4/1/75	6/15/75	9/1/75
Carpenter	$8.53	$8.83	$9.07
Shingler	8.66	8.96	9.20
Hardwood Floor Worker	8.73	9.03	9.27
Millwright	9.03	9.33	9.57
Saw Filer	8.61	8.91	9.15
Table Power Saw Operator	8.63	8.93	9.17
Pneumatic Nailer or Power Stapler	8.78	9.08	9.32
Wood Fence Builder on Residential Projects	7.46	7.76	8.00
Roof Loader of Shingles	7.20	7.50	7.74
Pile Driver Foreman	9.41	9.71	9.95
Bridge or Dock Carpenter and Cable Splicer	8.66	8.96	9.20
Piledriver Man — Derrick Bargeman	8.66	8.96	9.20
Head Rockslinger	8.76	9.06	9.30
Rockslinger	8.66	8.96	9.20
Rock Bargeman or Scowman	8.56	8.86	9.10
Cabinet Installer	8.53	8.83	9.07
Acoustic Installer (1 Nov. 1974)	8.73	9.03	9.27

The Union may, at its discretion, upon at least sixty (60) days' written notice prior to dates indicated, allocate the increases outlined below to (1) Hourly Rates, (2) Health and Welfare, (3) Vacation, (4) Pension, (5) Apprenticeship & Training Fund:

12/ 1/74	30¢ per hour
4/ 1/75	45¢ per hour
6/15/75	50¢ per hour
9/ 1/75	50¢ per hour
6/15/76	$1.00 per hour

1602. Apprentices covered by terms of this Agreement shall be paid the following percentage of the Journeyman Carpenters' hourly wage rate:

Trainee Period	Percentage
First 6-month period	60%
Second 6-month period	65%
Third 6-month period	70%
Fourth 6-month period	75%
Fifth 6-month period	80%
Sixth 6-month period	85%
Seventh 6-month period	90%
Eighth 6-month period	95%

1602.1. Piledriver trainees covered by the terms of this Agreement shall be paid the following percentage of the Piledriver Man's hourly wage rate:

Trainee Period	Percentage
1st three-month period	70%
2nd three-month period	75%
2nd six-month period	80%
3rd six-month period	85%
4th six-month period	90%

1602.2. Insulation Installer Trainees and Weatherstripping Installer Trainees shall receive the following percentage of the Journeyman Carpenter's hourly wage rate:

Trainee Period	Percentage
1-400 Hours	50%
401-800 Hours	60%
801-1200 Hours	70%

1201-1600 Hours	80%
1601-2000 Hours	90%

1602.3. Acoustical Installer Trainees shall receive the following percentage of the Journeyman Carpenter's hourly wage rate:

Trainee Period	Percentage
1st month (probationary)	50%
Next two months	60%
2nd three months	65%
3rd three months	70%
4th three months	75%
5th three months	80%
6th three months	85%
7th three months	90%
8th three months	95%

1603. Men working from Bosun Chairs or Swinging Scaffolds, or suspended from a rope or cable, shall receive 25% per hour above the applicable Journeyman, Apprentice or Piledriver Trainee rate. All employees working from Bosun Chairs shall wear a safety belt provided by the Contractor.

1604. Stabbing Interlocking Sheet Pile (See paragraph V of Appendix A—Special Working Rules for Piledrivers).

1605. When an employee uses survey instruments, he shall receive not less than the rate of pay for his regular classification.

1606. Separate negotiations will be held on special working rules for scaffolding. Upon completion of these negotiations, the special working rules agreed upon shall be attached and made a part of this Agreement.

1607. Overtime Rates: Double time for all overtime, except for Piledriver Man—Bridge or Dock Carpenters on tide work (See Tide Work Schedule) and as provided for Remote Projects in Article XIV. Overtime hours shall be paid at the overtime rates for hours worked.

1608. A Carpenter who performs work of forming in the construction of open cut sewers or storm drains shall receive a premium of 13¢ per hour in addition to his Carpenter's scale. This premium shall apply only on an operation in which horizontal lagging is used in conjunction with Steel H-Beams driven or placed in pre-drilled holes for that portion of a lagged trench against which concrete is poured, namely, as a substitute for back forms, which work is performed by piledrivers.

1609. Riggers: The same wage scale shall apply as the craft to which rigging is incidental.

1610. Welders: The same wage scale shall apply as the craft to which welding is incidental.

1611. Tide Work Schedule: The following provisions shall apply to Piledriver Men on jobs or projects working a single shift only:

1611.1. When an employee is called out to work broken time or tide work Monday through Friday, the minimum pay for such work shall be eight hours at the applicable regular, straight-time rate or rates. Subject to the above minimum, in computing the time to be paid for under this provision, eight hours or less worked between 8:00 A.M. and 5:00 P.M. shall be paid for at the applicable straight-time rate or rates, and time in excess of eight hours worked between 8:00 A.M. and 5:00 P.M. and any time worked before 8:00 A.M. or after 5:00 P.M. shall be paid for at the applicable overtime rate or rates.

1611.2. In the event an employee is called out to work broken time or tide work on Saturdays, Sundays or holidays, the applicable overtime rate or rates shall be paid for all time worked and the minimum pay shall be six hours at such overtime rate or rates.

1612. Foremen: The selection of the individual who will be craft foreman is at the sole discretion of the Contractor. It is understood that a craft foreman shall be an employee employed under the terms of this Agreement and shall receive the foreman's differential. Such craft foreman may work with the tools of the trade in accordance with the provisions of paragraph 403. Only craft foremen who normally work with the tools of their trade during straight-time periods may work with the tools of their trade during overtime periods. The need for any number of craft foremen required for the performance of the work shall be determined in accordance with the provisions of paragraph 402. It is understood that in certain cases, by reason of custom and practice established by the parties, a craft foreman may direct the work and employees of more than one craft. If a dispute arises with respect to the application of this understanding, such dispute shall be determined according to the procedure set forth in Article V of this Agreement on the basis of such custom and practice. Whenever the employer assigns supervisory authority to an employee covered by the terms of this Agreement, the employee will be paid at the foreman's rate.

1613. Except in case of emergency, if any of the employees not covered by this Agreement, as set forth in paragraph 201 (such as superintendents, assistant superintendents or master mechanics), shall act in the capacity of a craft foreman or work with the tools of a craft or trade signatory to this Agreement, he shall be a member of the Union.

ARTICLE XVII

Health and Welfare

1701. The parties have established a Joint Health and Welfare Trust Agreement between the Contractors and the Union. Each Contractor covered by this Agreement shall

contribute the sum designated in Attachment 1 to the Carpenters Health and Welfare Trust for Southern California.

1701.1. The Contractor may make voluntary contributions on behalf of craft superintendents or assistant craft superintendents, as they are defined in the exclusion clause of paragraph 201, in the amounts and manner to be determined by the Trustees.

1701.1.1. Within thirty (30) days of the effective date of any National Health Insurance Plan, the Union may at its discretion distribute the monies designated in Attachment I to (1) Hourly Rates, (2) Vacation, or (3) Pension.

1701.1.2 Effective June 15, 1975—The Union has the option of allocating five cents (5¢) of any wage increase to the Health and Welfare Fund for the purpose of Contract Administration as outlined below. This money paid into the fund is to be used for the purpose of supplementing sums available for administrative expenses of the Health and Welfare Fund including expenses of collection of delinquent Employer contributions and assisting covered employees and their eligible dependents in filing and processing of benefit claims.

1702. In case the auditors for the Board of Trustees conduct an audit and determine that a Contractor has violated the provisions of this Agreement for hours worked (or paid for), in his method of computation of contributions, or if adequate records are not made available to allow the auditor to make his determination in that regard, or if hours worked for each payroll period are not recorded on payroll records, or in case the gross compensation, including any remuneration or compensation not required by this Agreement, divided by the hours reported, exceeds the employee's base rate, plus $3.00 per hour, the following formula shall apply automatically to the entire Carpenters' payroll. For the first

violation determined by the auditors for the Board of Trustees, the following formula shall apply only to the employees involved. For the second and subsequent violations determined by the auditors for the Board of Trustees, the following formula shall apply to the entire Carpenters' payroll:

1702.1. The gross compensation of the employee paid or payable by reason of his work shall be divided by the base rate, i.e., the lowest hourly contract wage rate, including any differentials, for any classification in which the employee worked during the report periods involved in the audit, and the quotient from that calculation shall be multiplied by the applicable rate of health and welfare contribution. The resulting sum is owning to and shall be paid to the said Trust. For purposes of this provision, the said quotient shall be deemed to be the number of hours worked by the employee during the report periods involved in the audit.

1702.2. In case a Contractor, thus audited, fails to comply with the provisions of this Article within seventy-two hours after written notice is sent, via Registered Mail or Certified Mail-Return Receipt Requested by the Trust Office, the Union shall have the right of withholding service from such Contractor until such payments are made.

1703. Any Contractor who is audited by the Board of Trustees and concerning whom the Board of Trustees concludes that contributions to said Trust have not been computed or made by him in the manner required by paragraph 1702, shall be liable for the expense of such audit in addition to any other liability set forth under this Agreement or the Agreement and Declaration of Trust establishing the Carpenters Health and Welfare Trust for Southern California.

1704. Any Contractor shall make available to the Board of Trustees, upon its request, a copy of his quarterly State Tax Return.

1705. The Board of Trustees may authorize the attorneys for the said Trust to sue and attach in connection with delinquent accounts.

ARTICLE XVIII

Pension Plan

1801. The parties have established a Joint Pension Trust Agreement between the Contractors and the Union. Each Contractor covered by this Agreement shall contribute the sum designated in Attachment 1 to the Carpenters Pension Trust for Southern California.

1801.1. The Contractor may make voluntary contributions on behalf of craft superintendents or assistant craft superintendents, as they are defined in the exclusion clause of paragraph 201, in the amounts and manner to be determined by the Trustees.

1802. The audit procedures of paragraphs 1702, 1703, 1704 and 1705 are incorporated in this Article by reference.

ARTICLE XIX

Vacation Savings and Holiday Plan

1901. The parties have established a Joint Vacation Savings and Holiday Plan and Trust. Each contractor shall make payments in the amount designated in Attachment 1 to the 11-County Carpenters Vacation Savings and Holiday Plan.

1902. The contributions so made shall be deemed to be, and shall be treated as, subject to withholding tax and Social Security and Unemployment taxes as a part of the total compensation payable at the end of the individual Employer's payroll period during which such work is performed or paid for, but the full per-hour payment shall be transmitted to the Plan. Such payments shall not be a part of the hourly wage rates contained in this Agreement for the pur-

pose of computing overtime or reporting time or for any other purpose of this Agreement or part of the "regular rate" or "basic hourly rate" for the purpose of the Federal Fair Labor Standards Act or the Walsh-Healy Act or any other law, ordinance or regulation, except that if, consistent with the foregoing, such payments can be considered and treated as a part of the wage prevailing in the area for the purpose of the Federal Davis-Bacon Act and similar federal, state or local laws, ordinances or regulations, they shall be so considered and treated.

1903. The provisions of paragraphs 1702, 1703, 1704 and 1705 are incorporated into this Article by reference.

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ARTICLE XXII

Pre-Job Conference

2201. It is agreed there will be a pre-job conference prior to the start of any job or project at the option of either party where the agreed or estimated cost is $500,000 or more.

2202. The individual Contractor shall advise the Union, in writing, of the names and addresses of all subcontractors to be employed or contracted with for services to be performed under this Agreement. Such written notice shall be made at the pre-job conference or prior to the commencement of work by any such subcontractor.

2203. The individual employer shall, upon request of the Union, submit letters of work assignment.

* * *

APPENDIX F

Special Rules for Residential Construction

In addition to the Working Rules contained in Article XIII, the following special rules for residential construction shall pertain only to that rough and finished carpentry work

performed on a piecework basis and shall be specifically limited to the construction of wood frame housing whether it be single family residences, apartments or condominiums.

Any Contractor eligible under the above definition may qualify for the special rules only if he meets all of the following conditions. Failure to comply with the following conditions shall exclude such Contractor from the special rules and he shall abide by the rules pertaining to all Contractors.

The Contractor must register the job or project with the Carpenter's Trust Office the minimum of 30 days prior to the start of construction and supply the following information:

1. Name, address, telephone number, contract license of developer or owner.
2. Name, address, telephone number, contract license of general contractor, if one utilized.
3. Project title and address.
4. List of Carpenter Employer subcontractors and their subcontractors, and revisions of said list prior to a subcontractor commencing work on a job or project.
5. Lending institution.

A minimum of ten (10) calendar days prior to the start of construction, the Contractor shall submit the following information to the Trust Office and a pre-job conference may be requested by the Union, any affected Contractor, or the Trust Office. Whether or not a pre-job conference is held, the Contractor shall submit to the Trust Office a breakdown of the contract detailing:

1. Number of housing units.
2. Square feet of floor area of each story of each unit and total square feet of project.

Minimum man-hours for fringe benefit payment purposes shall be determined by the Trust Office on the following basis:

1. On the basis of six man-hours per 100 square feet of floor space for rough carpentry.
2. On the basis of one man-hour per 100 square feet of floor space for finished carpentry.

This estimate will then determine the minimum amounts of money to be contributed from the project to the Trust over the duration of the project. The report should be filed monthly on Trust forms on a project man-hour basis as required by the Trust Agreement and/or the Master Labor Agreement.

The above minimum formula shall be reviewed after the first six (6) months, then after the second six (6) months, then annually by the parties to the Agreement. The formula may be revised by the parties based upon the above reviews.

In addition to the above, and prior to the start of work, the Trusts may require a cash deposit with ten (10) days notice to the employer in the amount of two consecutive months' benefits that may accrue to the Trusts from the Contractor or subcontractor who intends to perform carpentry work under this special provision for piecework contractors.

If the Contractor or subcontractor who selects to operate under this piecework agreement fails or refuses to make the payments to the Trusts as required, the Trust office shall immediately notify the Union to withhold service from any and all jobs of said Contractor or subcontractor.

In the event that said job or project and/or its Contractor or subcontractor does not follow the above procedures and then chooses to operate on a piecework basis, the Union shall have the right to take any legal or economic action

including withdrawal of services and strike action against said project and its contractors and subcontractors.

For those contractors who are eligible under the special conditions for residential houses, the following additional delinquency definition shall apply.

1. Failure to register the job as required.
2. Failure to list all the subcontractors Carpenter employees and any revised list of subcontractors or their subcontractors prior to their commencement of work.
3. Failure to register with the Trust office.
4. Failure to report employees of sub-tier subcontractors Carpenter employees who have not registered as residential.
5. Failure to attend a pre-job conference when a conference is scheduled on jobs in excess of $1,000,000.00 (one million dollars).

Any disputes arising between the parties in connection with this section are subject to the provisions of Article V.

1977 CONTRACT PROPOSALS OF WOELKE & ROMERO FRAMING, INC. TO SOUTHERN CALIFORNIA CONFERENCE OF CARPENTERS

The attached contract proposal is made to supercede and, therefore, modify all existing collective bargaining agreements, including but not limited to the 1974-1977 Carpenters Master Labor Agreement and the 1974 Memorandum Agreement between Woelke & Romero Framing, Inc., and all its affiliated or related companies and the Southern California Conference of Carpenters. Woelke & Romero Framing, Inc. reserves the right during the course of negotiations to add to, subtract from, or modify the attached proposal.

Submitted: _____, 1977

AGREEMENT

THIS AGREEMENT is made this ____ day of _____, 1977, at Los Angeles, California between WOELKE & ROMERO FRAMING, INC. ("EMPLOYER") and the SOUTHERN CALIFORNIA CONFERENCE OF CARPENTERS on behalf of its affiliated District Councils and Local Unions in the Eleven Southern California Counties and the United Brotherhood of Carpenters and Joiners of America ("UNION").

ARTICLE I
UNION RECOGNITION

A. The Employer recognizes the UNION as the sole and exclusive collective bargaining representative of all employees in the following appropriate collective bargaining unit: all rough-framing carpentry employees employed by

the Employer at its jobsites in the Eleven Southern California Counties, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

B. Supervisors shall not perform work normally performed by employees in the above appropriate collective bargaining unit except in cases of emergency, when incident to the training of new employees, or when such work is performed in the course of giving instructions to employees.

ARTICLE II
DEFINITIONS

A. *Eleven Southern California Counties* shall mean the following counties in the State of California: Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, and Kern.

B. *Employee* shall mean a person employed by the Employer who is within the collective bargaining unit set forth in Article I.A above.

C. *Supervisor* shall mean an individual employed by the Employer having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

D. *Party or Parties* to this Agreement shall mean the EMPLOYER, on the one hand, and the UNION on the other.

ARTICLE III
COVERAGE

A. This Agreement shall apply to all work specified in paragraph B of this Article performed by the Employer in the Eleven Southern California Counties.

B. This Agreement covers: all rough-framing carpentry work above or below ground or water level on all construction including but not limited to construction, erection, alteration, repair, modification, demolition, addition or improvement of or to a building or any other structure, or construction.

ARTICLE IV
UNION-SECURITY

A. Employees employed by the EMPLOYER for a period of 8 days continuously or accumulatively shall be or become after the 8-day period, or 8 days after the effective date of this Agreement, whichever is later, members of the UNION and shall remain members of the UNION as a condition of continued employment. Membership in the UNION shall be available upon terms and qualifications not more burdensome than those applicable at such times to other applicants for membership in the UNION.

B. The EMPLOYER shall not be required to discharge any employee pursuant to this section until a written notice from the UNION of such employee's non-compliance with this section, stating all pertinent facts showing such non-compliance, shall have been served upon the EMPLOYER.

C. Subject to the foregoing, the EMPLOYER shall have complete freedom of selectivity in hiring, and the EMPLOYER retains the right to reject any job applicant referred by the UNION for any reason. The EMPLOYER may discharge any employee for just cause; provided, there shall

be no discrimination on the part of the EMPLOYER against any employee, for activities on behalf of, or representation of, the UNION not interfering with the proper performance of his duties.

D. The EMPLOYER may discharge any employee for just cause. Disputes shall be subject to the grievance and arbitration provisions of this Agreement.

ARTICLE V

EMPLOYER'S USE OF UNION HIRING HALL

A. In the employment of employees for all work covered by this Agreement, the following provisions shall be applicable:

1. The Local Unions shall establish and maintain open and non-discriminatory employment lists for the use of persons desiring employment on work covered by this Agreement and such workmen shall be entitled to use such lists free of charge.

2. The EMPLOYER may call upon the Local Union having work and area jurisdiction for such men as they may from time to time need, and the respective Local Union may furnish to the EMPLOYER the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the EMPLOYER strictly in accordance with the provisions of this Article.

3. It shall be the responsibility of the EMPLOYER when exercising the foregoing option, to give the Local Union the pertinent information regarding the employee's employment.

4. The Local Union or District Council will dispatch in accordance with the request of the EMPLOYER each such qualified and competent workman from among those entered on its lists in numerical order to the EMPLOYER

by the use of a written referral in the following order or preference, and the selection of workmen for referral to jobs shall be on a non-discriminatory bases:

a. Workmen specifically requested by name who have been employed, laid off or terminated as Carpenters in the geographic area of the 11 Southern California Counties, as the case may be, within three years before such request.

b. Workmen who within the five years immediately before the EMPLOYER's order for men, have performed work of the type covered by this Agreement in the geographic area of the Agreement, provided such workmen are available for employment.

c. Workmen whose names are entered on said lists and who are available for employment.

5. When ordering workmen of the skills required, the EMPLOYER will give notice to the Local Union not later then 2:30 p.m. of the day prior (Monday through Friday) or, in any event, not less than 17½ hours before the required reporting time and, in the event that 48 hours after such notice the Local Union shall not furnish such employees, the EMPLOYER may procure employees from any other source or sources.

6. The EMPLOYER shall be under no obligation to order or to hire workmen referred to the EMPLOYER by the UNION in accordance with the foregoing procedure; in addition, the EMPLOYER retains expressly the right to reject any workmen so referred who have been previously terminated by the EMPLOYER for just cause.

ARTICLE VI
CLASSIFICATIONS

A. Should the EMPLOYER employ employees in the prosecution of work covered by this Agreement in occupations or upon equipment which is not covered by one of

the classifications herein specified, such employment shall, within three working days after a work assignment is made or the equipment is operated, be temporarily classified by the EMPLOYER and the UNION under the classifications contained herein which will more nearly fit the particular character of the employment.

B. The number of employees and the number of classifications of employees required to perform any operation covered by this Agreement shall be determined by the EMPLOYER.

C. Because the EMPLOYER and the UNION recognize the necessity of eliminating restrictions on production and promoting efficiency, nothing shall be permitted that restricts production or increases the time required to do the work, and no limitation shall be placed upon the amount of work which an employee shall perform, nor shall there by any restriction against the use of any kind of machinery, tool, or labor saving devices, provided, however, that such machinery or power equipment shall be furnished by the EMPLOYER and provided further that no employee shall be required to work under any conditions that are injurious to his health or safety in conflict with a present well-established custom regulating such use where the work is being performed.

D. The UNION agrees to permit the occasional or temporary transfer of employees of one classification to any other classification or between crafts; provided that, when such transfers are made, the employee shall be paid for the entire day on the basis of the rate of the highest paid classification in which he worked during the day.

ARTICLE VII
WAGES

Each employee employed under this Agreement shall receive at least the minimum hourly wages specified in Appendix A attached hereto; provided, however, that the EM-

PLOYER may, at its sole option, compensate the employees covered by this Agreement on a piece-work or other basis as long as said compensation equals or exceeds the minimum hourly wage rates set forth in Appendix A for the respective employee's proper classification hereunder.

ARTICLE VIII
FRINGE BENEFITS

A. *Holidays.*

1. The following days are recognized as holidays: New Year's Day, Decoration Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Friday after Thanksgiving Day, and Christmas Day. If any of the above holidays should fall on a Sunday, the Monday following shall be considered a legal holiday. Work on such days shall be paid for at the Sunday and Holiday overtime rate. No work shall be required on Labor Day except in case of extreme urgency when life or property is in imminent danger.

2. The EMPLOYER shall pay to each eligible employee holiday pay at the rate of his regular minimum hourly wage rate as set forth in Appendix A if the employee does not work on said holiday for the EMPLOYER. If the employee works on the holiday, the employee shall receive his wages earned for so working and holiday pay at his regular minimum hourly wage rate as set forth in Appendix A.

3. To be eligible for holiday pay, the employee must work his normally scheduled workday before and after the holiday.

B. *Health and Welfare.*

1. The EMPLOYER agrees to provide for each employee covered by this Agreement a health, dental, prescription drug, and eye care insurance plan equal in benefits

to the benefits now enjoyed by each employee hereunder. The selection of the insurance carrier and program shall be at the EMPLOYER's sole option. The cost of such program and insurance for both employee and dependent coverage shall be paid for by the EMPLOYER.

2. The EMPLOYER agrees to maintain the level of benefits provided initially under paragraph 1 above at its expense.

C. *Vacations.* The EMPLOYER shall provide directly to each employee vacation pay at the same rate, in the same amount, and at the times each such employee would otherwise receive such vacation pay if the EMPLOYER were contributing to the fund known as Joint Vacation Savings and Holiday Plan and Trust.

D. *Advancement Fund.* The EMPLOYER signatory hereto shall not be obligated in any manner to make any contributions to the fund known as the Construction Industry Advancement Fund.

* * *

ARTICLE XIV
GENERAL WORKING CONDITIONS

A. *Apprentices.*

1. The EMPLOYER may employ persons as apprentices to perform work covered by this Agreement. The employment of such apprentices shall be at the EMPLOYER's sole option; provided, however, that if the EMPLOYER does employ apprentices, such employment of such apprentices shall be in accordance with the standards of UNION's Local Joint Apprenticeship Committee; provided, further, that the ratio of apprentices to journeymen shall be at the EMPLOYER's sole option.

2. Apprentices covered by the terms of this Agreement shall be paid the following percentage of the journeyman employee's minimum hourly wage rate:

TRAINEE PERIOD	PERCENTAGE
1st 6-month period	60%
2nd 6-month period	65%
3rd 6-month period	70%
4th 6-month period	75%
5th 6-month period	80%
6th 6-month period	85%
7th 6-month period	90%
8th 6-month period	95%

B. *Shifts, Hours of Work, and Overtime.*

1. Eight consecutive hours, exclusive of lunch period, between 8:00 A.M. and 5:00 P.M., shall constitute a day's work. Forty hours, Monday 8:00 A.M. through Friday to 5:00 P.M. shall constitute a week's work.

2. All time worked in excess of eight consecutive hours, exclusive of lunch period, or all time worked in excess of forty straight-time hours per week and all time worked before 8:00 A.M. and after 5:00 P.M. and all work performred [sic] on Saturdays, Sundays and holidays shall be paid at the overtime rate, except as otherwise provided for in this Article.

3. For a period of not less than five consecutive working days, the EMPLOYER may deviate the starting time of the complete job from 8:00 A.M. to 7:00 A.M. for one of the following rreasons [sic]: desert heat and/or wind, traffic conditions or similar conditions existing at the jobsite which impair the progress of the job.

4. The EMPLOYER may deviate the starting time of the complete job to 7:30 A.M., for not less than five consecutive working days for any reason.

5. Overtime rates shall not be paid for work performed before 8:00 A.M., Monday through Friday, on jobs where deviation in shift-starting time is in compliance with the provisions contained in paragraph 3 or 4 above.

6. When so elected by the EMPLOYER, multiple shifts may be worked for five or more consecutive days, provided that the UNION is notified 24 hours in advance of the effective date of the starting of such multiple-shift operations.

7. The EMPLOYER shall have the right to designate the craft or crafts on any project or portion thereof who shall work in a multiple-shift basis provided, however, that men working on multiple shifts shall not be interchangeable with those working on a single-shift bases. In no event shall the regular working hours of separate shifts overlap, nor shall any interval between shifts exceed the reasonable time necessary to change shifts and in no event shall such interval exceed one hour.

8. It is understood that a single and a multiple shift may work concurrently on a project.

9. If the EMPLOYER elects to work the day shift between 8:00 A.M. and 5:00 P.M., that shift shall work eight consecutive hours exclusive of meal period. Second or third shifts shall work seven consecutive hours exclusive of meal period, for which working time employees on each shift shall receive eight hours' pay at straight-time rates, Mondays through Fridays.

10. The EMPLOYER may regulate the starting time of the two-shift operation to permit the utilization of daylight hours by starting the first shift prior to 7:00 A.M. and each shift shall work seven and one-half consecutive hours exclusive of meal period, for which time employees on each

shift shall receive eight hours' pay at the straight-time rate, Monday through Friday.

11. On regular two or three-shift operations, the EMPLOYER may deviate the starting time of the day shift by the same procedure provided in paragraphs 1302.3, 1302.4 and 1302.5.

12. It is agreed that the EMPLOYER and the UNION may mutually agree, in writing, upon different starting and quitting times for any of the shift arrangements provided in paragraphs 1 through 11 above.

13. On a three-shift operation starting at 8:00 A.M., Monday, the 15th of Friday graveyard shift ending on or before 8:00 A.M. Saturday morning will be considered Friday work. The Saturday graveyard shift ending on or before 8:00 A.M. Sunday morning will be considered Saturday work. The Sunday graveyard shift ending on or before 8:00 A.M. Monday morning will be considered Sunday work.

14. Any time worked from Friday midnight to Sunday midnight or on holidays or in excess of the regular shift hours shall be paid for at the applicable overtime rate, except as provided above. Overtime rates shall not be paid on shift premium pay.

15. Overtime rates for employees performing overtime work shall be two (2) times the employee's regular minimum hourly wage rate specified in Appendix A.

16. Special conditions on a job brought about by prohibitions which are imposed on the hours of work by a public authority relating to public safety or other emergency public requirements shall allow the employer to perform work outside the regular shift hours and an employee shall work seven consecutive hours for which he shall receive eight hours' straight-time pay, Monday through Friday.

17. An employee working on Saturdays, Sundays or holidays shall be guaranteed four hours' pay at the appropriate overtime rate and, if more than four hours are worked, the employee shall be paid for actual hours worked at the appropriate overtime rate.

18. Any workman or employee reporting for work at the regular starting time for whom no work is provided shall receive pay for two hours at the stipulated rate and all fringe benefits for his classification for so reporting unless he has been notified before the end of his last preceding shift not to report; and any employee who reports for work and for whom work is provided shall receive not less than four hours pay; and all fringe benefits for his classification and, if more than four hours are worked in any one day, shall receive not less than a full day's pay therefor, unless prevented from working for reasons beyond the control of the employer, including, but not limited by, such factors as inclement weather, or breakdown causing discontinuance of a major unit of the project during which time employees are not required or requested to remain on the project by the EMPLOYER or his agent. Workmen or employees referred to the EMPLOYERs' jobs by the UNION from the hiring hall who arrive in an unfit conditions for work, without proper tools, credentials, or who are not ready to go to work or who are not otherwise qualified shall not be paid showup time or subsistence. The employee shall furnish the EMPLOYER with his current address and phone number, if any. The EMPLOYER shall furnish the employee with the EMPLOYER's current address and telephone number at the time of employment. Employees who voluntarily quit shall receive pay only for hours worked.

19. Employees shall travel to and from their work on their own time and by means of their own transportation.

C. *Meal Periods and Payment of Wages.*

1. Employees shall not work more than five (5) consecutive hours without a one-half hour (½) meal period. When employees work over five hours without being provided with a one-half hour meal period, they shall receive one-half hour pay at the double time rate. When an employee is required to work overtime for more than three (3) hours over the regular eight (8) hours, the EMPLOYER agrees to provide a meal period and the employee shall have sufficient time to eat the meal without loss of pay. In the event an employee is required to work through an overtime meal period, then the employee shall receive pay for one-half hour at the double time rate. Meal periods may be staggered so as to meet job requirements.

2. All wages must be paid weekly on the job. Each employee shall be paid prior to the end of his shift. When men are discharged, they must be paid wages due them at the time of discharge, in accordance with the California State Labor Code. When an employee quits, he must be paid wages due him in accordance with the California State Labor Code. Nothwithstanding the grievance procedure in this Agreement, employees who are not paid in accordance with the provisions of this paragraph only, may, if desired, appeal directly to the Labor Commissioner.

The EMPLOYER shall be financially responsible for all wages owed to any workman for work performed for the EMPLOYER by the EMPLOYER's employees on the EMPLOYER's project, provided there has been an appropriate demand made in writing to recover said wages and a copy of such demand has been furnished to the EMPLOYER. The Grievance and Arbitration procedure as set forth in this Agreement shall apply to any issue or dispute concerning the non-payment of wages under this Agreement.

3. If the EMPLOYER fails to pay his employees on the regular, established pay day for his job, the UNION may institute the grievance procedure of this Agreement.

4. All employees shall be notified ten (10) minutes in advance of termination and they shall be allowed the balance of the shift or half shift off to gather tools and personal belongings and shall be paid to the end of the shift or half shift.

5. Upon termination by the EMPLOYER, the employee shall be paid immediately in full. His pay status shall continue for each calendar day until pay received (not more than eight (8) hours' pay shall be charged for any calendar day), not to exceed 30 work days.

6. When the UNION and the EMPLOYER consider and agree that conditions in the industry in the area covered by this Agreement warrant a shortened workday or workweek, the parties shall jointly give adequate consideration and discussion of such changes; provided, however, that any such changes in the workday or workweek shall not be used to encourage the payment of overtime to a greater extent than that which is being paid at the time a change is made in the workday and workweek.

D. *Tools, Equipment, Efficiency and Safety.*

1. The EMPLOYER shall be responsible for the upkeep and sharpening of saws during the course of employment on the job by providing either saw-sharpening time or saw-sharpening service. It is understood that employees at the beginning of employment shall have sharp saws.

2. Journeymen and apprentices shall furnish their own tools, but shall not furnish, rent or lease saw horses, ladders, mitre boxes, electric drills, automotive equipment to be used for the purpose of jauling [sic] or delivering the EMPLOYER's material or equipment, or any kind of power

operated machines or saws. Each employee shall arrive on the job with tools in proper conditions. To implement this section, the individual employee shall provide a tool box with a lock.

3. The EMPLOYER shall furnish cool and potable drinking water in sufficient quantities for the needs of the employees and make available sanitary drinking cups and salt tablets.

4. In the event free parking facilities are not available within three blocks of a jobsite, the EMPLOYER will provide such facilities and the EMPLOYER shall have the right to designate parking areas to be used, where, because of congested parking conditions, it is necessary to use public facilities, the EMPLOYER shall reimburse the employee for the cost of such parking upon being presented with a receipt or voucher certifying to the cost thereof, such reimbursement to be made on a weekly bases or at the conclusion of the project, whichever occurs earlier. In the event free parking facilities are not available within three blocks of the jobsite, designated parking areas shall be reasonably level and graded to drain.

5. The EMPLOYER shall not discharge or discriminate against an employee under this Agreement because of any industrial injury incurred prior to employment, or the filing of a claim for workmen's compensation benefits. Nothing herein shall obligate the EMPLOYER to hire on [sic] continue in employment any employee who cannot perform the duties of the job for which he seeks employment or is employed.

6. When an employee is injured while at work to the extent of being unable to work for the balance of the day, he shall be paid for a full day at his regular rate. His ability to work or not to work shall be determined by a qualified physician.

7. It is agreed that the UNION through its Business Agents shall use their efforts to encourage greater efficiency on the job and that they refrain from the solicitation of premium payments for employees represented by the UNION. The employees and the UNION shall use their efforts to encourage greater efficiency compatible with sound construction safety practices on the job.

8. The UNION shall cooperate (1) with the EMPLOYER in carrying out all of the EMPLOYER's safety measures and practices for accident prevention and (2) employees shall perform their duties in each operation in such a manner as to promote efficient operations of each particular duty and of any job as a whole. The EMPLOYER must post the name and address of its doctor and the compensation insurance carrier on the jobsite.

9. All Federal and State Safety Rules, regulations, orders and decisions shall be binding upon the EMPLOYER and shall be applied to all work covered by this Agreement. No worker shall be required to work under unsafe conditions.

10. The EMPLOYER shall be solely responsible for implementation and maintenance of such safety laws, rules regulations, standards, orders and decisions. Neither the UNION nor any Local Unions or District Councils are responsible for such implementation or maintenance.

11. The EMPLOYER will furnish for the use of his employees any necessary waterproof or foul weather gear, safety helmets, or any other necessary protective clothing as required by CAL-OSHA or the EMPLOYER. Employees may be hald [sic] monetarily responsible for such items properly checked out to them with the understanding that such items broken, worn out in normal use, or lost in a manner beyond the control of the employee are excluded.

* * *

ARTICLE XVII
TERM, TERMINATION AND RENEWAL

This Agreement shall become effective on ____, 1977, and shall continue through midnight, June 15-16, 1978. It shall automatically be renewed from year to year thereafter unless either party gives to the other party a written notice of its desire to modify, amend, or terminate it at least 60, but not more than 90, days prior to June 15, 1978, or any June 15th thereafter if this Agreement has been automatically renewed.

Upon the termination of this Agreement, whether by expiration of its terms or otherwise, all rights and obligations of the EMPLOYER, the UNION, and the employees shall cease.

This Agreement is executed this ____day of _____, 1977.

WOELKE & ROMERO FRAMING, INC.	SOUTHERN CALIFORNIA CONFERENCE OF CARPENTERS
By _____	By _____
Its _____	Its _____

COUNTER PROPOSALS SUBMITTED BY THE 11 SOUTHERN CALIFORNIA COUNTIES OF CARPENTERS TO WOELKE & ROMERO FRAMING, INC. REGARDING AMENDMENTS TO THE MASTER LABOR AGREEMENT.

The 11 Southern California Conference of Carpenters submits the following counter proposals with the understanding that during the course of negotiations the Unions reserve the right to modify or submit additional proposals.

ARTICLE I — COVERAGE

101. As is in MLA.

101.1. As is in MLA.

101.1.2. Amend section to read as follows: "Each individual contractor whether corporate or other legal entity shall be liable under, subject to and bound by the Agreement and shall be binding upon the heirs, executors, administrators, purchasers and assigns of the individual contractor and shall be binding upon the contractor regardless of a change of entity, name or association or joint venture and shall bind any entity or venture that is a principle [sic], financially associated with the contractor. It is agreed that the wages, hours and working conditions of this Agreement are the wages, hours and working conditions in the area covered by the Agreement in the area referred to as San Diego County or the forty-six (46) Northern California Counties, the contractor agrees to be bound by terms and conditions of the applicable AGC and Home Builders Association Agreement with the Carpenters Union. In the event the Contractor performs work described as drywall, residential or commercial, then such contractor agrees to comply with the terms, conditions, wages and fringe benefits set forth in the Agreement referred to as the Master Drywall Agreement between the California State Council of the United

Brotherhood of Carpenters and Joiners of America and the California Drywall Contractors Association and such drywall work shall be considered as work within the coverage as set forth in the provisions of this Agreement."

101.2. As is in MLA.

102. As is in MLA.

(AMENDED TO READ)

103. The purposes of this paragraph 103 are to preserve and protect the work opportunities normally available to employees and workmen covered by this Agreement, maintenance and protection of standards and benefits of employees and workmen negotiated over many years, and preservation of the right of union employees, employed hereunder, from being compelled to work with non-union workmen.

(AMENDED TO READ)

103.1. In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Courte [sic] upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

(AMENDED TO READ)

103.1.1. Definition of Subcontractor. A subcontractor is defined as any person (other than an Employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement.

(AMENDED TO READ)

103.2. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, san [sic] and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

(AMENDED TO READ)

103.3. Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite ot [sic] process or supply materials for the convenience of the Contractor for jobsite use), herein called "jobsite work," and because of the Union's concern that subcontractors who are not subject to the same total labor costs as those who are party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:

(AMENDED TO READ)

103.3.1. The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less

than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

(AMENDED TO READ)

103.3.2. The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.1.1.

(AMENDED TO READ)

103.3.3. Failure to comply with the foregoing subparagraph 103.1.1 and 103.1.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorneys' fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance.

(AMENDED TO READ)

103.4. The parties of this Agreement recognize and acknowledge that the foregoing provisions have been agreed upon in the context of the on-site construction industry uncertainty over applicable law, the bargaining history of the parties of twenty (20) or more years, particularly in the area of multi-employer bargaining, and the absence of strikes and lockouts growing out of the negotiating process. The absence of definitive legal criteria may make renegotiation or modification of this paragraph necessary or advisable,

and for these reasons it is agreed that, in the event this provision is determined unlawful by the NLRB or the U.S. District Court, or the District Court enjoins its enforcement then this entire paragraph shall be re-opened for negotiation of amendments by either party giving 15 days notice, and upon the parties failing to agree on amendments, then Article III of this Agreement shall be suspended and the parties may take either strike or lockout action, upon 60 days prior written notice.

103.2. As is in MLA (except renumbered to 103.5.).

103.3. As is in MLA (except renumbered to 103.6.).

103.4. DELETE

103.5. As is in MLA (except first sentence of paragraph is deleted and renumbered to 103.7.).

103.5.1. As is in MLA (except renumbered to 103.7.1.).

103.5.2. As is in MLA (except renumbered to 103.7.2.).

103.5.3. DELETE

103.5.4. As is in MLA (except the word "listed" is deleted and renumbered to 103.7.3.)

103.5.5. As is in MLA (except renumbered to 103.7.4.).

103.5.6. As is in MLA (except renumbered to 103.7.5.).

103.5.7. DELETE

103.5.8. DELETE

103.5.9. DELETE

(AMENDED TO READ)

103.5.10. All carpenter employees shall be covered by this Agreement and the provisions applicable to Trust Funds. The Trustees shall have authority to audit Contractor records to determine the appropriate contributions and shall have specific authority to examine the Contractor's Federal W-2 Forms and 1099 Forms and his Quarterly State Tax

Returns, and all other records required by Trust Fund to complete appropriate audits. (renumbered to 103.7.6.)

(AMENDED TO READ)

103.5.11. Each individual Contractor found to be delinquent may be required to pay for all legal fees, court costs, and auditing costs in connection with such delinquency. Liquidated damages in the amount of thirty-five ($35.00) or fifteen percent (15%) of the amount due, whichever is greater, may also be assessed. (renumbered to 103.7.7.)

103.5.12. As is in MLA. (renumberd [sic] to 103.7.8.)

103.5.13. ADD (renumbered to 103.7.9.)

REGISTRATION OF JOBS:

The contractor must register all jobs or projects with the Carpenters Trust Office at the minimum of 30 days prior to the start of construction, and supply the following information.

1. Name, address, telephone number, and contractors license number.
2. Jobsite address.
3. Starting date of job, and approximate finish date.
4. Legal description of property.
5. Type of structure.
6. Man hours estimated: A) Framing, B) Drywall, C) Finish, D) Insulation, E) Forms, F) Shingles, and G) Scaffolding.
7. Square footage.
8. Bid award in dollars.
9. Building permit number.
10. New construction, alteration, or repair work?
11. Name of bank and number of payroll accounts.
12. List of current carpenter employees.

13. Name & address of workmans compensation carrier.
14. Name of qualified safety man on jobsite.
15. Description of safety program.
16. Name & address of accounting firm handling payroll, if any.

ITEM 3.

Motion to Transfer Proceedings to the Board.

United States of America Before the National Labor Relations Board, Washington, D. C.

(Title Omitted in Printing)

Comes now Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondents; Woelke & Romero Framing, Inc., Charging Party; and Counsel for the General Counsel of the National Labor Relations Board, being all parties to these proceedings, and hereby petition the Board, in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay, to exercise its powers under Section 102.50 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and to transfer these proceedings to the Board.

The parties agree that the charges, the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing, the Answer to Complaint, and the Stipulation of Facts, including the exhibits attached thereto, shall constitute the entire record in these proceedings, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and desire to submit these cases for findings of fact, conclusions of law, and order directly to the Board.

In the event the Board grants this Motion, the parties request that the Board set a time for filing of briefs.

Respectfully submitted,

LEVY, KOSZDIN, GOLDSCHMID & SROLOFF

Dated at Los Angeles, California, this 19th day of October, 1977.

By /s/ Lawrence Rosenzweig
Lawrence Rosenzweig
Counsel for Respondents
CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

TYRE & KAMINS

Dated at Los Angeles, California, this 19th day of October, 1977.

By /s/ John W. Prager, Jr.
Counsel for Charging Party
WOELKE & ROMERO FRAMING, INC.

Dated at Los Angeles, California, this 19th, day of October, 1977.

By /s/ Andrew J. Stites
Andrew J. Stites
Counsel for the General Counsel
National Labor Relations Board

ITEM 4.

NLRB Decision and Order
(By Reference to Petition for Writ of Certiorari).

239 NLRB No. 40.

United States of America Before the National Labor Relations Board.

Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Woelke & Romero Framing, Inc. Cases 21-CB-6196 and 21-CC-1922.

(Text of NLRB Decision and Order appears at Appendix C of Petition for Writ of Certiorari in No. 80-1798).

ITEM 5.

Opinion of Three-Judge Panel of U.S. Court of Appeals for the Ninth Circuit (By Reference to Petition for Writ of Certiorari).

United States Court of Appeals, Ninth Circuit.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner, v. National Labor Relations Board, Respondent.

Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., Petitioner, v. National Labor Relations Board, Respondent.

International Union of Operating Engineers, Local No. 701, Petitioner, v. National Labor Relations Board, Respondent.

Woelke & Romero Framing, Inc., Petitioner, v. National Labor Relations Board, Respondent, and Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Intervenors.

National Labor Relations Board, Petitioner, v. Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondents. Nos. 78-3469, 78-3487, 78-3619, 78-3468 and 79-7011.

Dec. 26, 1979.

On Petition for Review of the Order of the National Labor Relations Board.

Before SNEED and KENNEDY, Circuit Judges, and EAST* District Judge.

(Text of three-judge panel opinion appears at Appendix B of Petition for Writ of Certiorari in No. 80-1798).

ITEM 6.

Opinion, *En Banc*, of U.S. Court of Appeals for the Ninth Circuit (By Reference to Petition for Writ of Certiorari).

United States Court of Appeals for the Ninth Circuit.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner vs. National Labor Relations Board, Respondent. No. 78-3469.

Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3487.

International Union of Operating Engineers, Local No. 701, Petitioner, vs. National Labor Relations Board, Respondent. No. 78-3619.

Woelke & Romero Framing, Inc., Petitioner, vs. National Labor Relations Board, Respondent, Carpenters Local No. 944 and Carpenters Local No. 235, Intervenors. No. 78-3468.

National Labor Relations Board, Petitioner, vs. Carpenters Local No. 944, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Respondent. No. 79-7011.

Petitions for Review of Orders of the National Labor Relations Board. Argued and submitted October 16, 1980.

Before: Browning, Chief Judge, Choy, Wallace, Sneed Anderson, Schroeder, Fletcher, Farris, Nelson, Canby and Norris, Circuit Judges.

Filed: April 17, 1981.

CANBY, Circuit Judge.

(Text of *en banc* opinion appears at Appendix A of Petition for Writ of Certiorari in No. 80-1798).

ITEM 7.

Notice of U.S. Supreme Court Order Granting Petition for Writ of Certiorari.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

October 5, 1981

John W. Prager, Jr., Esq.
Musick, Peeler & Garrett
4000 MacArthur Boulevard, Suite 900
Newport Beach, California 92660

RE: Woelke & Romero Framing, Inc. v. National Labor Relations Board, et al.;
Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. National Labor Relations Board, et al.; and
Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. v. National Labor Relations Board, et al.
Nos. 80-1798, 80-1808 and 81-91

Dear Mr. Prager:

The Court today took the following action in the above cases:

"The motion of Air Conditioning & Refrigeration Institute, et al. for leave to file a brief as *amici curiae* in Nos. 80-1798 and 80-1808 is granted. The motion of The Associated General Contractors of America, Inc. for leave to file a brief as *amicus curiae* in No. 80-1808 is granted. The petitions for writs of certiorari

are granted. The cases are consolidated and a total of one hour is allotted for oral argument."

* * *

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

Office - Supreme Court, U.S.
FILED
[redacted]
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1798, 80-1808 and 81-91

IN THE

Supreme Court of the United States

October term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX—VOLUME II
(Nos. 80-1808 and 81-91)

Petitions for Certiorari Filed:
No. 80-1798: April 29, 1981
No. 80-1808: April 29, 1981
No. 81-91: July 14, 1981
Certiorari Granted October 5, 1981

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IN THE

Supreme Court of the United States

October term, 1981

Nos. 80-1798, 80-1808 and 81-91

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX—VOLUME II (Nos. 80-1808 and 81-91)

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APPENDIX A: ALLEGATIONS IN UNFAIR LABOR PRACTICE CHARGE

Before the National Labor Relations Board

(Charge filed by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. against International Union of Operating Engineers, Local No. 701)

The Union entered into a collective bargaining agreement which contains a subcontractor clause, a copy of which is attached, marked Exhibit "A" with the AGC. The Union has and continues to seek to enforce the provisions of said clause through the filing of grievances and otherwise and AGC continues to comply. Such conduct has occurred within the last six months and includes, but is not limited to, pursuing of a grievance with respect to H. A. Anderson Co. on a Clackamas, Oregon project on behalf of Fred Meyer; with respect to Ausland Construction, Inc. at a project in Klamath Falls; and with respect to Vik Construction Company at a Hewlett Packard project.

APPENDIX B: AMENDED COMPLAINT AND NOTICE OF HEARING

Before the National Labor Relations Board

International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

and

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.

It having been charged by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. that International Union of Operating Engineers, Local No. 701, AFL-CIO and Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein respectively called Local 701 and AGC and collectively called Respondents) have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges:

1.

The charge herein was filed on April 26, 1977, and a copy was served on Respondents by registered mail on or about April 29, 1977.

2.

(a) AGC is an association of employers engaged in all types of construction work throughout the entire state of Oregon and five counties in the southwestern portion of the state of Washington. The employer-members of AGC have delegated their collective bargaining authority to the AGC for the purpose, *inter alia*, of negotiating and entering collective bargaining contracts on behalf of its employer-members with

the bargaining representatives of their employees, including Local 701.

(b) During the past year, the employer-members of AGC in the course and conduct of their business, annually purchased goods, materials, and supplies valued in excess of $50,000 which were shipped to said employer-members directly from states in the United States other than the states of Oregon and Washington.

3.

AGC is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4.

Local 701 is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5.

On or about June 1, 1975, Local 701 and AGC entered into a written contract which expires May 31, 1980, and contains the following provisions:

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article,

unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

* * * * *

At all times material herein, and continuing to date hereof, Respondents have continued and are continuing to give effect to the aforesaid contract clauses and since on or about November 22, 1976, have reaffirmed the aforesaid contract clauses, and have attempted to enforce said contract clauses.

6.

By the aforesaid contract clauses as described in paragraph 5 above, Respondents entered into an agreement whereby AGC and its employer-members have agreed to cease and refrain from handling, using, selling , transporting, or otherwise dealing in the products of other employers and have agreed to cease doing business with other persons.

7.

The acts of Respondents described in paragraph 5 above, occuring in connection with the operations of AGC and its employer-members as described in paragraph 2 above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states of the United States, and have led and lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 8(e) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 1st day of November, 1977, at 10:00 A.M., in Room 300, Six Ten Broadway Building, 610 S. W. Broadway, Portland, Oregon, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person or otherwise and give testimony.

Form NLRB-4668, Summary of Standard Procedures in

Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

YOU ARE FURTHER NOTIFIED THAT, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, each Respondent is required to file with the undersigned Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to this Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in said Complaint shall be deemed to be true and may be so found by the Board. Immediately upon the filing of its Answer, each Respondent shall serve a copy thereof on each of the other parties.

DATED at Seattle, Washington, this 20th day of September, 1977.

(Signature line omitted in printing)

APPENDIX C: ANSWER OF OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

Before the National Labor Relations Board
(Title omitted in printing)

Respondent Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein "AGC") in answer to the Amended Complaint filed by the Regional Director, admits, denies and alleges as follows:

I

Respondent admits the allegations contained in paragraphs 1, 2, 3 and 4.

II

Answering paragraph 5 Respondent admits all allegations contained therein except Respondent denies that it has attempted to enforce Article VIII (quoted in paragraph 5) and denies that it has given effect to, reaffirmed, or attempted to enforce Article IX (quoted in paragraph 5).

III

Answering paragraphs 6 and 7, Respondent admits all allegations of fact contained therein. Those allegations in paragraphs 6 and 7 which are conclusions of law require no answer.

IV

Respondent alleges that, in order to minimize the potential liability of its members for breach of Article VIII, it intends to continue giving effect to that article until it is ordered by the Board or a court not to do so.

V

Respondent denies all allegations of fact not specifically admitted herein.

(Signature line omitted in printing)

APPENDIX D: ANSWER OF INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 701, AFL-CIO

Before the National Labor Relations Board
(Title omitted in printing)

For Answer to the Amended Complaint, International Union of Operating Engineers, Local No. 701, AFL-CIO, admits, denies, and alleges as follows:

I

Admits paragraphs 1, 2, 3, 4, and 5 of the Amended Complaint.

II

Denies paragraphs 6 and 7 of the Amended Complaint.

First Affirmative Defense

I

Article VIII, Section 1 of the Master Labor Agreement is protected by the construction industry proviso to Section 8(e) of the Act.

Second Affirmative Defense

I

No facts are alleged upon which to base a finding of unfair labor practices or a violation of Section 8(e) of the Act with respect to Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. or any of its members.

Third Affirmative Defense

I

An employer-employee relationship exists between the Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. and its members and International Union of Operating Engineers, Local No. 701.

WHEREFORE, International Union of Operating Engineers, Local No. 701 prays that the Amended Complaint be dismissed.

(Signature line omitted in printing)

APPENDIX E: STIPULATION OF FACTS

Before the National Labor Relations Board
(Title omitted in printing)

It is stipulated and agreed by and between the International Union of Operating Engineers, Local No. 701, AFL-CIO (herein Engineers), by its attorneys Carney, Probst, Levak & Cornelius; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (herein AGC) by its attorneys Dezendorf, Spears, Lubersky and Campbell; Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein ABC) by its attorneys Souther, Spaulding, Kinsey, Williamson & Schwabe; and Dale B. Cubbison, Counsel for the General Counsel of the National Labor Relations Board, in order to effectuate the purposes of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, and to avoid unnecessary cost and delay:

1. The Charge, Affidavit of Service of the Charge, Complaint and Amended Complaint, Affidavits of Service of the Complaint and Amended Complaint, Answer of Engineers, Answer of AGC, and this Stipulation of Facts and the exhibits attached hereto, constitute the entire record in the above-referenced case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing and the taking of testimony or the submission of evidence before an Administrative Law Judge, and the issuance of a decision of an Administrative Law Judge; and that they desire to submit this case for findings of fact and conclusions of law and issuance of order directly by the Board.

2. Upon a charge filed by ABC, the General Counsel for the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, issued an Amended Complaint and Notice of Hearing herein on the 20th day of September, 1977. The original complaint issued on September 14, 1977.

3. (a) The Answer of Engineers to the Amended Complaint was duly filed with the Regional Director on the 3rd day of October, 1977.

(b) The Answer of AGC to the Amended Complaint was duly filed with the Regional Director on or about the 3rd day of October, 1977.

4. AGC is an association of employers engaged in all types of construction work throughout the entire state of Oregon and five counties in the southwestern portion of the state of Washington. The employer-members of AGC, including H. A. Andersen Co., Inc. have delegated their collective bargaining authority to AGC for the purpose, *inter alia*, of negotiating and entering collective bargaining contracts on behalf of its employer-members with the bargaining representatives of their employees including Engineers. During the past year, the employer-members of AGC in the course and conduct of their business, annually purchased goods, materials, and supplies valued in excess of $50,000 which were shipped to said employer-members directly from states of the United States other than the states of Oregon and Washington.

5. AGC is now, and has been at all times material herein, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the act.

6. Engineers is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

7. AGC has collective bargaining agreements with six different labor organizations including Engineers. The agreement between AGC and Engineers was entered into on or about June 1, 1975, and expires May 31, 1980 (Exhibit A attached and herein called Master Agreement). Engineers is party to labor contracts with, and represents employees of many contractors in Oregon and Southwest Washington who do not belong to AGC.

8. The Master Agreement contains the following provisions:

Article VIII

Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction,

alteration, painting, or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

At all times material herein, and continuing to date hereof, Engineers has continued and is continuing to give effect to Article VIII and Article IX, and since November 22, 1976, has reaffirmed these Articles, and has attempted to enforce Article VIII by filing grievances against AGC employer-members pursuant to the Master Agreement.

For example, Engineers filed a grievance (Exhibit B attached) on November 22, 1976, claiming that H. A. Andersen Co., Inc. violated the subcontractor clause (Article VIII) of the Master Agreement by subcontracting work covered by the Master Agreement to a subcontractor that did not have an existing labor agreement with Engineers covering such work, said subcontracting having occurred on Andersen's Fred Meyer Distribution Center construction project in Clackamas, Oregon. This construction project was a multi-million dollar project on which Andersen was general contractor. During the twelve month project there was a substantial period of time (approximately seven to eight months) when no Andersen unit employees represented by the Engineers were present on the jobsite.

On construction jobs performed by Andersen in Oregon and

southwest Washington during the last three years, there have been substantial periods of time when none of Andersen's unit employees represented by Engineers were present at particular jobsites. On the average there have been no such employees on particular Andersen jobsites 40 percent of the total days of the projects.

9. It is the general policy of AGC and its members including Andersen to abide by the subcontractor clause in the Master Agreement, and they will continue to do so unless a court or the National Labor Relations Board orders that the clause should not be enforced.

10. At all times material herein and continuing to date thereof AGC has continued and is continuing to give effect to Article VIII.

11. Solely for purposes of this proceeding it is stipulated that Engineers has neither threatened to picket nor has it in fact picketed AGC or any of its members to enforce Article VIII, Section 1.

12. The parties in negotiating and interpreting the Master Agreement, have agreed that the subcontractor clause at Article VIII, Section 1 is applicable at all times to all jobsites of the signatory employers regardless of whether or not the signatory employers themselves employ Engineers members at said jobsites.

13. The term "Union" employed in Article VIII, Section 1, means Engineers. Thus, Article VIII, Section 1 is applicable to preclude subcontracting job site work to the subcontractor who enters into a collective bargaining agreement with a union other than the Engineers to perform jurisdictionally relevant work.

14. AGC has approximately 200 contractor members. At any one time, one or more members of AGC employ members of Engineers under the terms of Exhibit A. The large marjority of AGC contractors employ members of Engineers on one or more projects in a given year.

15. Solely for the purpose of this proceeding, it is stipulated that one of the objectives of Engineers in agreeing to and implementing Article VIII of Exhibit A is to preserve work

opportunities for its members with AGC contractors.

16. Solely for the purpose of this proceeding from approximately 1960 to 1975 consecutive Master Agreements preceding Exhibit A have contained provisions almost identical to Article VIII and Article IX in Exhibit A.

17. This Stipulation of Facts is made without prejudice to any of the objections that any party may have as to the materiality or relevancy of any facts stated herein.

18. The parties to the Stipulation shall have 60 days from execution of this Stipulation to mail simultaneous briefs to the Board and the failure of any party to mail a brief within this time shall be a waiver of right to file such brief.

EXECUTED this 2nd day of December, 1977.

(Signature line omitted in printing)

APPENDIX F: EXCERPTS OF AGC—LOCAL 701 CONTRACT

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Article II
Territory

This Agreement shall cover the entire State of Oregon and the following area in the State of Washington: The Counties of Klickitat, Skamania, Clark, Cowlitz, Wahkiakum and that portion of Pacific County south of a straight line made by extending the north boundary line of Wahkiakum County west to the Pacific Ocean and the Pacific Ocean bordering the territorial jurisdiction of this Agreement.

Article III
Definitions

A. The term "Association" as used herein shall mean the OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. A roster of the Oregon-Columbia Chapter, Associated General Contractors of America, Inc., members who have assigned their bargaining rights, shall be furnished to the Union at the signing of this Agreement and thereafter upon acceptance of new members or withdrawal of said bargaining rights.

B. The term "Employer, Contractor or Employers" as used herein shall mean any individual, partnership, firm or corporation signatory, or who becomes signatory, to this Labor Agreement.

C. The term "Union" as used herein shall mean The

International Union of Operating Engineers, Local No. 701.

D. The term "Employee or Employees" as used herein, shall refer to any employed person or persons.

E. The term "Workman" as used herein, shall refer to any person in the labor market not employed.

F. The term "Subcontractor" as used herein shall refer to any person, firm or corporation who agrees with, orally or in writing, to perform or who in fact performs for, or on behalf of, an Employer, any part or portion of work covered by this Agreement.

G. The term "Authorized Representatives" as used herein, shall mean the Chapter Manager of the A.G.C. and the Business Manager of the Union or their representatives.

H. The term "Operating Engineer" or "Operator" as used herein, shall refer to any person who is a bargaining unit employee under the jurisdiction of the International Union of Operating Engineers, Local No. 701 regardless of the classification or type of work performed.

* * * * *

Article V
Recognition and Security

Section 1. The Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and all other Employers signatory or who become signatory hereto; hereby recognize and acknowledge Local No. 701 of the International Union of Operating Engineers as the sole and exclusive collective bargaining representative of all employees covered by this Agreement.

It is understood that the Union does not have jurisdiction over employees of the contractor as defined and excluded by the Labor Management Relations Act of 1947, as amended, and it being further understood that these employees shall not use the tools of the craft covered by this Agreement.

The International Union of Operating Engineers, Local No. 701 hereby recognizes the Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., as the sole and exclusive bargaining representative for their respective members.

Section 2. All workmen employed by the Employers to perform work covered within this Agreement shall become members of the Union not later than the eighth (8th) day following the beginning of such employment, and shall maintain membership in good standing in said Union as a condition of employment.

Section 3. All written requests by the Union for removal of employees for non-payment of or failure to tender initiation fees and dues, or for not being dispatched will be recognized and accepted by the Employers. The Employers agree to immediately remove the named employees from employment on all work covered by this Agreement.

Article VI
Agreement Binding Upon Parties

(a.) The Employers signatory hereto, understand and agree that one of the primary purposes of this Agreement is to "stabilize conditions of work in the area" by establishing uniform rates of pay, working conditions, etc., which are uniformly imposed on all Employers. Therefore, the Employers signatory hereto, or who become signatory, understand and agree that this Agreement shall cover and be binding throughout the duration of this Agreement.

* * * * *

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Section 2. Nothing in paragraph 1 of this Article shall be construed to prevent or discourage Pre-Job Conferences between the Union, the contractor and the proposed subcontractor for the purpose of reaching mutual agreement upon the work to be done by the subcontractor.

Section 3. The Employer shall be responsible and liable for payment of all sums of money required by all terms of this

Agreement incurred by any subcontractor. The parties agree the Administrative Trust Office shall notify an Employer within thirty (30) calendar days of any and/or all delinquent payments of monetary contributions due the Trust Office by any and/or all subcontractors used by said Employer. The Employers further agree they will notify the Administration Trust Office of any and/or all subcontractors (company name and address) used by said Employer on any job and/or project. If the Employer has notified the Trust Office of said subcontractors and the Trust Office should fail to notify the Employer within the specified time limitations, then the Employer shall be relieved of all responsibility for the subcontractor's delinquent payments to the applicable Trust Funds.

* * * * *

Article XI
Hiring

1. The Employer and the Union recognize that they are required by law not to discriminate against any person with regard to employment or Union membership because of age, race, religion, color, sex, national origin, or ancestry and hereby declare their acceptance and support of such laws. This shall apply to hiring, registration for employment, placement for employment, training, rates of pay or other forms of compensation, lay-off or termination, and application for admission to Union membership.

2. Workmen covered by this Agreement have certain accrued rights or benefits for themselves and their dependents. Such rights are generally continuous while under employment and remain effective until a certain period of time after lay-off or discharge.

3. It is recognized within the construction industry the Union affords the prime source of qualified workmen (Operating Engineers). The Employers shall hire qualified Operating Engineers by telephone from the Union dispatcher. Whenever the Employer requires Operating Engineers on any job or project, he shall notify the Local Union dispatch office by telephone, stating the location, starting time, approximate duration of the job, the type of equipment to be operated, the

work to be performed and the number of workmen required. The Union shall give the Employer the dispatch number assigned to each workman ordered by the Employer at the time the order is placed.

4. Any Joint Venture shall have the rights of any of its component individual Employers, and any reorganized company shall retain the privileges of its former position under this Article.

5. The Employer shall have the right to transfer any or all Operating Engineers employed by said Employer from one job or project within Local No. 701's territorial jurisdiction to another job or project within Local No. 701's territorial jurisdiction. The Employer shall notify Local No. 701's dispatch office prior to starting work on said job or project. It is understood and agreed for purposes of this Agreement that operations out of a fixed location are considered as one job.

6. The Union through pre-job conference can allow, Employers signatory to this Agreement, to select key workmen from the Group I 'Out of Work List.'

7. The Union, through Pre-Job Conference or by virtue of a Memorandum of Understanding between the bargaining representatives of this Agreement and the bargaining representatives of other geographical areas, may make provisions to allow certain key employees to be brought into the territorial jurisdiction of Local No. 701. Such employees shall be allowed to remain on the job or project in the classification for which they were cleared (dispatched), only for that project's duration. Such employees shall not be transferred to another project, acquire Group I status and/or recall privileges by virtue of such employment.

8. The transferring of employees and the hiring of key employees by an Employer signatory to the National Pipeline Agreement for work performed under said Agreement shall be done according to the provisions of said Agreement. However, such employees shall be allowed to remain on the job or project in the classification for which they were cleared or dispatched, only for that project's duration. Such employees shall not be transferred to another project, acquire Group I status and/or any

recall privileges by virtue of such employment.

9. The referral procedure as contained herein shall be followed except that, (a) requests by employers for key men to act as foreman shall be honored without regard to the requested man's place on the out-of-work list, providing the requested workmen are members of the Operating Engineers and have been employed by the contractor requesting said workmen within the preceding twelve (12) month period; however, at no time shall the requested Operating Engineer foreman (requested from outside Local 701 jurisdictional area) exceed 50% of the Operating Engineer foremen employed on any job or project, (b) requests by employers for a particular man previously employed by the employer within the geographical area of this Agreement and who has been laid off or terminated by the employer within two (2) years previous to the request shall be honored without regard to the requested man's place on the out-of-work list, provided said employee was originally dispatched to the requesting employer in accordance with the terms and conditions of this Agreement, (c) when the employer has a bona fide need he may order Operating Engineers with special skills and abilities. The dispatcher shall attempt to refer persons possessing such skills and abilities in the order in which their names appear on the out-of-work list, (d) employees previously selected by the Employer as a foreman or supervisor may not be requested under the terms of this Article for any work classification other than foreman or supervision.

10. Upon written request of an Employer, signed by a senior representative of the Employer on a job or project and delivered to the Union hiring hall, stating that such Employer desires, on the basis of past satisfactory service in the industry or with the Employer, that a named Group I Employee who either (i) has for the immediately preceding fifteen (15) year period been employed or available for employment in one or more classifications contained within this Agreement, such employment shall have been within the jurisdictional area of Local No. 701, or (ii) who has for the immediately preceding ten (10) year period been employed or available for employment in one or more classifications contained within this Agreement

and has been during said ten (10) year period employed by the Employer requesting said workmen for a period of six months or more, such employment shall have been within the jurisdictional area of Local No. 701, be dispatched in a particular classification to such job or project. The Union Hiring Hall shall dispatch such Employee in such classification to such job or project, provided such employee is registered at the Union Hiring Hall (on the Out-of-Work List) at the time of the receipt of the written request, and not on the payroll of another Employer and provided, further, that no Employee shall be laid off or discharged to make room for such named Employee. It shall be the Employee's responsibility to establish proof of the above mentioned years of employment. He may do so by any means of objective criteria. Any employee hired by virtue of this paragraph (written request) may not be discharged for any reason other than just cause and cannot be laid off for a period of fifteen (15) available work days, for which the workman shall be employed. Any employee discharged or laid off in violation of this paragraph shall be made whole by the Employer.

11. The Union shall utilize the Health & Welfare, Vacation, Pension and Union records in establishing these accrued rights based on length of employment.

12. Registration or re-registration of applicants for referral shall be accepted by the Union without regard to age, race, color, sex, creed or national origin, at any time during its customary office hours. All applicants shall be registered in order by the date of registration. Group III applicants must contact the Union dispatch office every thirty (30) days or their names shall be struck from the list.

13. Upon the request of an Employer for men, the Union shall refer qualified Operating Engineers to that Employer in sufficient number required by the Employer in the manner and under the conditions specified in this Agreement from the list in the following order of referral, provided any order received by the Dispatch Office after 2:30 p.m., cannot have a reporting time for employees ordered for any time during the Day Shift following placement of such order, but may be placed for the

second or third shift for the day following placement of said order.

(a) Workmen shall be referred from Group I on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be nondiscriminatory and where workmen have equal criteria, all referrals from Group I will be in successive order as their names appear on the out-of-work list, and when Group I has been exhausted;

(b) Then, workmen from Group II shall be referred on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be nondiscriminatory and where workmen have equal criteria, all referrals from Group II will be in successive order as their names appear on the out-of-work list and when Group II has been exhausted;

(c) Then, workmen from Group III shall be referred on the basis of objective employment criteria, including experience, competence, residence and duration of the job. Such referrals shall be non-discriminatory and where workmen have equal criteria, all referrals from Group III will be in successive order as their names appear on the out-of-work list.

14. All Operating Engineers except as elsewhere noted in this Article shall be hired and/or rehired in accordance with the length of service with Employers in the Collective Bargaining Unit from the following three groups:

Group I — Workmen who have been employed in work classifications covered by this Agreement and have accrued Group I status prior to the signing of this Agreement or persons who have been employed by an Employer or Employers, party or parties to this Agreement, as an Operating Engineer, for an aggregate time of 1,000 hours or more in each of three (3) consecutive calendar years shall be classified Group I on April 1 of the calendar year immediately following the third (3rd) such consecutive calendar year.

(a) Once a workman has acquired Group I status he shall retain such status as long as he accumulates an aggregate time of at least 300 hours as an Operating Engineer during any four (4)

consecutive calendar years. Failure to meet the above requirements will result in loss of Group I status and on April 1, of the calendar year immediately following the fourth (4th) consecutive calendar year, be classified as a Group II workman.

(b) Workmen who have acquired Group I status shall have such status extended for any period of incapacity, military service, employment by a public, quasi-public or Government agency on the type or kind of craft work covered by this Agreement, employed as a Supervisor for an Employer signatory to this Agreement, employed by the Union, employed on any Union related training program, becomes an owner-operator, is transferred to a job or project in another geographical area or overseas on the type or kind of craft work covered by this Agreement and is continuously employed as such prior to returning to this territorial jurisdiction.

Group II — Workmen who have been employed by an Employer or Employers, party or parties to this Agreement, as an Operating Engineer, for an aggregate time of less than that required for Group I status:

(a) All workmen who have completed a training program participated in or sanctioned by Local No. 701, shall by virtue of the experience obtained in the training program acquire Group II status.

(b) Once a workman has acquired Group II status he shall retain such status by being employed by an Employer or Employers, party or parties to this Agreement for an aggregate time of at least 1,000 hours each calendar year. Failure to acquire 1,000 hours in any calendar year will result in loss of Group II status and on April 1, of the calendar year immediately following such calendar year, be classified as a Group III employee.

Group III—All workmen who do not meet the requirements of either Group I or Group II:

(a) Workmen in Group III shall be dispatched in such a manner that those with the most experience in the trade shall be dispatched first and those with the least experience in the trade, last.

(b) Workmen in Group III who are dispatched on two occasions for work which they say they are qualified to perform, and who fail to qualify for such work may not be dispatched again during that calendar year.

15. The Employer may reject any employee or applicant for employment dispatched by the Union Hiring Hall, provided, however, that any such employee shall be compensated as provided for in Article XIII of this Agreement.

16. Any workman who is rejected by the Employer shall be restored to his place on the list for his Group. When a workman is referred for employment and is employed less than thirty (30) days, he shall be restored to his place on the out-of-work list for his Group, less the number of days he worked.

17. In the event that the referral facilities maintained by the Union are unable to fill the requisition of an Employer for workmen within forty-eight (48) hours after such requisition is made by the Employer (Saturday, Sunday and holidays excluded), the Employer may employ applicants directly at the job site: provided, however, this forty-eight (48) hour time limit shall cease upon a workman's acceptance of a dispatch from the Union. If applicants are hired at the job site the Employer shall notify the Union of the names and dates of such hirings within forty-eight (48) hours of such hirings (Saturday, Sunday and holidays excluded).

18. Any employee employed by the Employer in violation of this Article shall forfeit all priority rights, and shall be removed from the job and re-registered at the bottom of the appropriate list for this Group. Should the Employer fail to terminate such employee after receipt of written notice, the Union may take any economic action against the Employer it deems necessary and shall not be in violation of this Agreement.

19. If a workman accepts a job referral from the Union and does not report to the job site for work, or if a workman is terminated for just cause, he shall be reregistered at the bottom of the appropriate list for his Group.

20. All employees of the Union who are members of the Union and all employees of Union or joint training programs,

employees of the International Union of Operating Engineers and all employees heretofore or hereafter advanced by their Employer to a supervisory position, shall upon returning to the employment of an Employer as an employee and/or registering on the out of work list under this Agreement do so with the same preference as if they had continually worked as employees for Employers.

21. An employee who has attained Group I or Group II status and enters military service shall retain such Group status at the time of discharge.

22. Whenever an employee is discharged and is not eligible for rehire the Union shall be notified in writing. Without notice to the Union in writing the employee shall be eligible for rehire. Termination slips stating why terminated should be given to all employees at time of termination.

23. When an Employer has Operating Engineers' equipment on the job and does not have an Operating Engineer employee available on the job site for the work to be performed he shall obtain an Operating Engineer under the terms and conditions of this Agreement. If an operating engineer is not available the Employer may temporarily use other employees when vacancies are caused by sickness, or other unavoidable absence beyond the control of the Employer. Such work shall in no way prejudice the Union's jurisdiction. When an Operating Engineer becomes available he will man the equipment.

Preferred Status For Employment

1. The Employers and Union recognize that because of technological advances requiring high speed production, injuries, job accidents, health and/or age, there are a great number of workmen within the construction industry who have provided many years of service to the industry, but who cannot now physically perform the work required of them on most jobs. However, they can be utilized on special jobs requiring less physical effort. Therefore, by agreement of both parties, a "Preferred List" of jobs shall be established and only those workmen qualified for "Preferred Status" be employed on such jobs.

2. Workmen registering on this Preferred List shall:

(a) Be ineligible to register and shall not register for work in any classification other than those specified in this Preferred Status for Employment section.

(b) Be fifty-five (55) or more years of age and have had at least ten years employment or availability for employment, in one or more classifications contained in this Agreement of the type or kind of craft work covered by this Agreement, in the territorial jurisdiction of Local No. 701. Also, workmen who do not meet such requirements but have a physical handicap preventing his employment in any classification except those specified in the Preferred List, and who has acquired a Group I status, or acquired such handicap as a result of a job accident while employed as an Operating Engineer, will be permitted to so register.

3. It is understood and agreed that this section pertaining to "Preferred Status for Employment" shall supersede all other hiring provisions of this Agreement.

4. The Employer shall call the Union Dispatch Office for all workmen required in the following classifications and shall not use workmen who were dispatched to perform work in other classifications except in cases of emergency. The preferred list shall pertain to pumps, air compressors, generators, elevators, hoists, grade rollers, tractors pulling a roller or compactor, welding machine operator, bell boy or radio operators and all other jobs of similar nature for which the Employer, when requesting a workman if or when required to be referred, agrees to use a workman from the preferred list.

5. Workmen registered on the Preferred List shall be dispatched in the order that they registered except that workmen will only be dispatched to jobs for which they are capable of performing. Workmen shall be dispatched from the Preferred List until the list is exhausted, then workmen shall be dispatched in accordance with the hiring provisions of this Article.

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Article XVI

Health Laws and Safety Measures

Section 1. The contractor and the employees shall comply

with all applicable Federal and State laws governing safety. The contractor shall provide safeguards, safety devices and protective equipment to protect the life and health of employees on the job. The employee shall use all protective equipment required, shall perform his work in a safe manner and shall comply with the contractor's safety regulations.

Section 2. Cool clean drinking water containers with cups (and salt tablets) shall be kept in close proximity to the workmen.

Section 3. The Employer shall furnish all safety equipment (such as hard hats, goggles, earplugs, hat liners if needed or required). The Employer shall furnish physical examinations when required by state or federal agencies. Physical examinations shall not be required by the Employer.

Section 4. The Employer should notify the Union immediately of all injuries of a critical nature and shall furnish all details of such injury.

Section 5. In case an employee believes the foreman has instructed him to work under hazardous conditions, he shall have the right to refuse to do so; however, he may be assigned to other work. No employee shall be terminated for refusing to work under hazardous conditions.

Section 6. The Employers and the Union agree that no employee shall work on any job or project alone during the hours of darkness.

Section 7. There will be safety meetings held on the job site, during working hours, at such times as the Employer shall designate to discuss problems of safety. Such meetings shall be held on the Employer's time and the Job Steward may assist the Employer in conducting safety meetings.

Section 8. To insure safety, to eliminate unncessary occupational accidents, and to protect the employees from the elements, the employers agree that:

(a) Equipment shall be properly cabbed, screened and roll-over type cabs or canopies installed. Curtains, umbrellas, heaters, summer and winter fans shall be installed as necessary to protect the employees. Small equipment, e.g., curb extrusion

machines, ditch witches, small dozers or loaders used where a height obstruction (such as inside buildings, under conveyor belts, etc.) would prevent the installation of a canopy, will not require a canopy. However, every effort shall be made to insure that these small pieces of equipment are utilized in a safe manner. Additionally, asphaltic and concrete paving machines and surfacing rollers shall only be required to meet OSHA standards. However, adequate weather protection must be provided to protect the employees (not protective clothing).

(b) The Employer shall use his best efforts to eliminate noise and fumes from exhaust on equipment.

(c) The seats on all equipment must have reasonable padding and comfort for the Operator and shall be maintained.

Section 9. If an Operator finds it necessary or otherwise refuses to operate a machine because of safety, it shall be a violation of this Agreement for the Employer to reassign that machine until it has been checked out by a qualified operating engineer master mechanic, mechanic foreman or equipment foreman (if the job does not have such, then the superintendent) and properly repaired.

Section 10. No Operating Engineer employee, while operating a piece of "heavy equipment," shall cross either a highway or train track without the Employer providing flagmen or signal light. In lightly traveled areas this provision shall not apply unless required by an agency or owner.

Section 11. Any employee injured on a job or project while working for an Employer shall be rehired by said Employer whenever the employee is released from the doctor to return to work, providing there is a job available that he can be assigned to. If no job is available, he shall be given preferential treatment in Article XI (Hiring). Such injured workman shall be given an out-of-work date coinciding with the date of the job accident.

Section 12. Both parties agree that Operating Engineers working in the construction industry may be subjected to various inherent, hazardous conditions such as heat, smoke, dust, noise, etc. which could be detrimental to their health, therefore, both parties pledge their mutual cooperation in rectifying such conditions.

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Article XVIII
Operating Conditions

Section 1. All parties to this Agreement pledge to use their best efforts to improve productivity in the construction industry. To insure good productivity, every man on the job should be productively engaged in work for his full time on the job. Toward this end, the parties to this Agreement have established a Productivity Board as provided for in the addendum to this Agreement.

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Article XX
Tools

A. HEAVY DUTY REPAIRMEN and/or WELDERS

Section 1. Heavy duty repairmen and/or welders shall furnish their own hand tools up to and including three-quarters (3/4) inch drive. However, the Employer shall furnish all special tools as needed, such as: socket wrenches and sockets over three-quarters (3/4) inch drive, hand wrenches two (2) inches or over, pin presses, spanner wrenches, air or electric wrenches, testing and measuring devices other than a hand rule, gear and bearing pullers, electric drills, reamers, taps and dies, oxy-acetylene hoses, gauges, torches and tips, twenty-four (24) inch pipe wrenches, jacks, comealongs, bars other than small cat bar, twenty-four (24) inch crescent wrenches and hammers over five (5) lbs.

Section 2. The Contractor agrees to provide an adequate, dry and safe place for the storage of employee's tools which may be necessary in the performance of his work. The Contractor agrees that while such tools are in the Contractor's custody, and providing that the employee has locked these tools in an adequate tool box, the Contractor will carry insurance or assume personal liability therefor to cover the full value of such tools which may be lost because of fire, flood or theft (through forced entry). Tools broken in the course of employment will be replaced or reimbursement therefor will be made by the Employer upon the presentation of satisfactory evidence.

In order to obtain the benefits of this paragraph, a Heavy Duty Repairman and/or Welder must provide the individual Employer with an inventory of his tools at the time he commences work and an additional inventory every thirty (30) days. If the inventory is to be checked by the Employer it shall be on the Employer's time.

Section 3. Heavy Duty Repairmen and/or welders shall not rent, lease, or otherwise furnish their own transportation on the job or project.

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Article XXIII
Preservation of Work

The parties signatory hereto understand and agree that a primary purpose of this Agreement is to perserve to the bargaining unit employees covered by this Agreement work which has traditionally been performed by them.

Article XXIV
Health and Welfare

1. In addition to the wage scales and other monetary provisions listed in this Agreement and/or Schedule "A" herein, all persons firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing A.G.C.-Operating Engineer Trust Fund, for the purpose of providing health and welfare benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with all requirements of the Trust Agreement. The applicable provisions of the existing Trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article, the Union is free

to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Trust Fund created and/or perpetuated by this Agreement and/or prior Agreements, shall be the Operating Engineer Health and Welfare Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Trust Fund is for the purpose of providing Health and Welfare benefits to the Operating Engineer employees covered by this Agreement and their families.

Article XXV
Pension

1. In addition to wage scales and other monetary provisions listed in this agreement and/or Schedule "A" herein, all persons, firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing A.G.C.-Operating Enqineer Trust Fund, for the purpose of providing pension benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with all requirements of the Trust Agreement. The applicable provisions of the existing Trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article of the Agreement, the Union is free to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Trust Fund created and/or perpetuated by this Agreement and/or prior Agreements, shall be the Operating

Engineer Pension Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Trust Fund is for the purpose of providing Pension benefits to the Operating Engineer employees covered by this Agreement, and their families.

Article XXVI
Vacation

1. In addition to wage scales and other monetary provisions listed in this Agreement and/or Schedule "A" herein, all persons, firms or corporations who are signatory parties, or who become signatory parties to this Agreement, shall pay into the existing Operating Engineer-Employer Vacation Fund, for the purpose of providing vacation benefits to all eligible employees covered by this Agreement, the contribution rates as specified in Schedule "A" per compensable man-hour for the appropriate year. Such payments shall be made on or before the 20th day of each month in accordance with the requirements of the Trust Agreement. The applicable provisions of the existing trust document are hereby adopted for the period covered by this Agreement or any renewal or extension thereof, and the Fund established by prior contributions under former agreements between the parties shall be recognized as a fund held in trust and therefore an appropriate depository for the contributions referred to herein above.

2. In the event an Employer fails to make the monetary contributions in conformity with this Article, the Union is free to take any economic action against such contractor it deems necessary and such action shall not be considered a violation of this Agreement.

3. The Vacation Fund created and or perpetuated by this Agreement and/or prior Agreements, shall be the Operating Engineer Vacation Fund and shall be one that is jointly established and equally administered by four (4) trustees each from the Employers and Employees. Said Vacation Fund is for the purpose of providing Vacation benefits to the Operating Engineer employees covered by this Agreement, and their families.

APPENDIX G: DECISION AND ORDER OF NLRB

Before the National Labor Relations Board

International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

and

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.

Upon charges filed by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (herein called ABC), on April 26, 1977,[1] and duly served on International Union of Operating Engineers, Local No. 701, AFL-CIO (herein called Engineers), and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.(herein called AGC), the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 19, on September 20, issued and served on Respondents an amended complaint and notice of hearing. The complaint alleges that Respondents entered into an agreement containing a subcontracting clause and an intertwining self-help provision whereby AGC and its employer-members have agreed to cease doing business with other persons in violation of Section 8(e) of the National Labor Relations Act, as amended (herein called the Act). On October 3, 1977, Respondents filed, and duly served on ABC and the General Counsel, their answer to the amended complaint in which they denied the commission of any unfair labor practices.

Thereafter, on December 2, 1977, Respondents, ABC, and counsel for the General Counsel entered into a stipulation of facts and motion to transfer the proceedings to the Board, wherein they agreed that the charges, the amended complaint, the answer to the amended complaint, and the stipulation of facts, including the exhibits attached thereto, shall constitute the entire record herein and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waive hearing before an Administrative Law Judge,

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[1]All dates are 1977, unless otherwise indicated.

the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's Decision, and desire to submit these cases for findings of fact, conclusions of law, and Order directly by the Board. The parties, however, expressly limited the stipulation of facts for the purposes of this proceeding only. In addition, the parties reserved the right to object to the relevancy, materiality, or competency of any of the facts stated in the stipulation.

On January 16, 1978, the Board issued an order approving the stipulation and transferring the proceedings to the Board and set a date for the filing of briefs. Thereafter, Respondents, ABC, and the General Counsel filed briefs in support of their respective positions. In addition, briefs *amici curiae* were filed on behalf of the American Federation of Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Chamber of Commerce of the United States of America.[2]

Pursuant to a notice of hearing issued by the Board on February 8, 1978, oral argument in this case and related proceedings[3] was held before the Board in Washington, D.C., on February 23, 1978. In addition to arguments presented by the parties involved in the several proceedings, permission to argue orally as *amici curiae* was granted to the Chamber of Commerce of the United States of America, the American Federation of

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[2]The Chamber's brief is primarily addressed to the issues raised in 239 NLRB No. 42, but also speaks to issues raised by this proceeding.

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[3]*Colorado Building Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 NLRB No. 41 (1978); *Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly Associates)*, 239 NLRB No. 42 (1978); *Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke Romero Framing, Inc.)*, 239 NLRB No. 40 (1978).

Labor and Congress of Industrial Organizations, the Building and Construction Trades Department, AFL-CIO, and the Laborers International Union of North America, AFL-CIO.

The Board has considered the entire record herein as stipulated by the parties, the briefs of the parties and the *amici curiae*, and the oral arguments made to the Board, and hereby makes the following findings and conclusions:

I. The Business of Respondent AGC

Respondent AGC is an association of employers engaged in the construction industry throughout Oregon and part of the State of Washington. The employer-members of AGC, including H. A. Anderson Company, Inc., have delegated their collective-bargaining authority to the AGC for the purpose of, *inter alia*, negotiating and entering into collective-bargaining contracts on behalf of its employer-members with the bargaining representatives of their employees, including Engineers. The employer-members of AGC, in the course and conduct of their businesses, annually purchased goods, materials, and supplies valued in excess of $50,000, which were shipped to said employer-members directly from States of the United States other than the States of Oregon and Washington. The parties stipulated, and we find, that AGC is, and has been at all times material herein, an association of employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and we find, that Respondent Engineers is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

1. Is the subcontracting clause, article VIII, section 1, contained in Respondents' current collective-bargaining agreement proscribed by the general provision of Section 8(e) of the Act, and, if so, is the clause protected by the first proviso thereto?

2. If lawful by itself, does the subcontracting clause in Respondents' current collective-bargaining agreement, when read in conjunction with articles IX and X, violate Section 8(e) of the Act?

B. The Stipulated Facts

As stated, AGC has at all material times herein been an organization of employer-contractors which has been delegated authority for the purpose of negotiating and entering into collective-bargaining agreements on behalf of its employer-members with the bargaining representatives of their respective employees, including Engineers.

On or about June 1, 1975, AGC and Engineers entered into a collective-bargaining agreement, effective June 1, 1975, through May 31, 1980, which contained, *inter alia*, the following relevant provisions:

Article VIII
Subcontractors and Other Employers

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

* * * * *

Section 3. The Employer shall be responsible and liable for payment of all sums of money required by all terms of this Agreement incurred by any subcontractor. The parties agree the Administrative Trust Office shall notify an Employer within thirty (30) calendar days of any and/or all delinquent payments of monetary contributions due the Trust Office by any and/or all subcontractors used by said Employer. The Employers further agree they will notify the Administration Trust Office of any and/or all subcontractors (company name and address) used by said Employer on any job and/or project. If the Employer has notified the Trust Office of said subcontractors and the Trust Office should fail to notify the Employer within the specified time limitations, then the Employer shall be

relieved of all responsibility for the subcontractor's delinquent payments to the applicable Trust Funds.

Article IX
Settlement of Disputes

Section 5. Should the parties involved fail to comply with the findings within five (5) days after such written notification by either party or fail to comply with any of the provisions and/or time limits established in this Article, unless mutually agreed to extend such limits, then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings and/or time limits and they shall not be considered in violation of any part of this Agreement.

Article X
Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement and/or any addendum relating thereto.

At all times material herein, Engineers has continued, and is continuing, to give effect to article VIII and article IX and has attempted to enforce article VIII by filing grievances against AGC employer-members pursuant to the master agreement.

Engineers, for example, filed a grievance on November 22, 1976, claiming that H.A. Anderson Company, Inc., violated the subcontractor clause by subcontracting work covered by the master agreement to a subcontractor that did not have an existing contract with Engineers covering such work, the subcontracting having occurred on an Anderson construction project in Clackamas, Oregon. During the 12-month period of the project, there were substantial periods of time when no Anderson unit employees represented by Engineers were present on the jobsite.

C. Contentions of the Parties

1. The subcontracting proposals

The General Counsel, Respondent AGC, and ABC all contend that the subcontracting provision in the current AGC-Engineers collective-bargaining agreement is proscribed by Section 8(e) of the Act. Specifically, General Counsel, Respondent AGC, and ABC urge that the clauses here are secondary and not privileged by the construction industry proviso to Section 8(e) of the Act because they are at substantial variance with the Supreme Court's discussion of the construction industry proviso in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). Furthermore, General Counsel, Respondent AGC, and ABC urge that, even if the subcontracting clause herein is privileged by the proviso to Section 8(e), the "self-help" provision in article IX of the collective-bargaining agreement removes whatever protections this clause might otherwise enjoy under the proviso.

Respondent Engineers contends initially that the subcontracting clause in issue is a lawful "primary" clause aimed at protecting unit work, with "unit" being defined as the unit coextensive with the scope of the multiemployer bargaining association. Beyond this, Respondent Engineers contends that, even if the subcontracting clause herein is secondary in nature, it is nonetheless privileged by the construction industry proviso to Section 8(e). Finally, Respondent Engineers urges that article IX of its current collective-bargaining agreement with AGC is not a "self-help" clause of the type or character which the Board has found illegal under Section 8(e). Instead, Engineers urges that the "enforcement" aspects of article IX are aimed at the enforcement of the grievance-arbitration machinery in the contract rather than to the use of economic action to force compliance with the subcontracting provision itself.

D. Discussion and Conclusions

1. The subcontracting clause

Turning initially to the subcontracting clause itself, we must determine whether the clause is primary or secondary in nature.

If the clause is primary, then Section 8(e)[4] has no application whatsoever, and the Union may engage in whatever actions it could otherwise take absent the restraints of Section 8(e). On the other hand, if the clause is secondary, then Section 8(e) and the proviso come into play and limit the procedures which may be utilized to obtain or enforce the operation of the clause.

The subcontracting clause in the instant case provides that employers signatory to the Engineers-AGC agreement shall not subcontract any jurisdictionally relevant work to any subcontractor who does not have an existing labor agreement with the Union ("union" is defined by the parties as Engineers). By its terms the clause herein permits performance of unit work by employees covered under other labor agreements with Engineers and not shown to be within the bargaining unit covered by the agreement between Respondents. Accordingly, the primary or secondary character must be evaluated by an examination of whether the conditions of the clause are limited to a requirement that subcontractors observe "the equivalent of union wages, hours and the like."[5]

Clearly, the clause herein does not limit subcontracting to firms which pay the equivalent of the contract wages, hours,

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[4]Sec. 8(e) provides that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing with any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work ....

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[5]*Local 437, International Brotherhood of Electrical Workers, AFL-CIO (Dimeo Construction Co.)*, 180 NLRB 420 (1969).

etc., contained in the Engineers-AGC agreement, but instead limits subcontracting to "signatory" firms. This type of union "signatory" clause is the type which we have consistently held is not concerned with the preservation of primary unit work, but one aimed at limiting the firms to those which AGC members may subcontract.[6] Therefore we find that article VIII herein is a secondary clause.

Having determined that the clause is secondary, however, we must now consider the contentions of the General Counsel, Respondent AGC, and ABC that the clause is not protected by the construction industry proviso to Section 8(e) because of the Supreme Court's decision in *Connell Construction Co., supra.*

In *Woelke Romero Framing, Inc.*, companion case to the instant one and also issued this day, we concluded that the Supreme Court's *Connell* decision construed the construction industry proviso to Section 8(e) to permit subcontracting clauses such as the one contained in the Engineers-AGC contract herein. For the reasons expressed in *Woelke Romero, supra,* we find that the subcontracting clause in the instant case is privileged by the construction industry proviso to Section 8(e).

Having determined that the subcontracting clause herein is secondary but nonetheless privileged by the proviso to Section 8(e), we now turn to the General Counsel's, Respondent AGC's, and ABC's contentions that the subcontracting clause is not privileged because it allows for the enforcement of the clause by other than judicial means.

Although Congress, by its enactment of the proviso to Section 8(e), made lawful certain secondary clauses in the construction industry, it nevertheless made clear that such agreements could not be enforced by the threats, restraint, or

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[6] *Heavy, Highway, Building and Construction Teamsters Committee for Northern California, IBT (California Dump Truck Owners Association),* 227 NLRB 269 (1976)(then-Member Fanning and Member Jenkins dissenting in part).

coercion prohibited by Section 8(b)(4).[7] This reflected the sense of Congress that, although such agreements could be lawful, the existing law with respect to the nonjudicial enforcement of secondary clauses should not be altered. Thus, in the conference report accompanying the 1959 amendments, the committee set forth that "[t]he proviso [to Section 8(e)] applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4)."[8]

When viewed in the context of the 1959 amendments generally, it thus appears that, in limiting the enforcement of valid "hot cargo" agreements in the construction industry to judicial means only, Congress did not intend that the proviso to Section 8(e) could be utilized or interpreted so as to allow the inclusion in collective-bargaining agreement provisions which would have the forseeable effect of authorizing 8(b)(4) violations.[9]

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[7]Sec. 8(b)(4)(ii)(B) provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) ... (ii) to threaten, coerce, or restrain any person engaged in commerce or an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease ... doing business with any other person ...

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[8]I. Leg. Hist. 943 (LMRDA, 1959).

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[9]Then Senator Kennedy explained in a discussion of Sec. 8(e) that:

Agreements by which a contractor in the construction industry promising not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e) ... Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) ....

It is not intended to change the law with respect to the judicial enforcement of these contracts .... [II Leg. Hist. 1433 (LMRDA, 1959).]

This Board, in a long line of decisions,[10] has consistently adhered to the views expressed by Congress with respect to the prohibition on economic action to enforce secondary agreements under the construction industry proviso. The Board (with court approval) has thus held that clauses which purport to authorize a union to employ economic action to enforce secondary subcontracting provisions will serve to remove whatever protections the secondary clause would otherwise enjoy under the proviso to Section 8(e).[11]

The main focus of our analysis of self-help clauses and their legality has been to determine the relationship between the clause purporting to authorize economic action and any secondary clauses limiting the subcontracting of work. In other words, subcontracting clauses and clauses authorizing the union to engage in economic action independent of one another, i.e., when a union's right to engage in economic action specifically excludes a subcontracting clause from its application, do not violate Section 8(e). It is only when the Board determines that the parties intended that the economic enforcement provisions apply to the subcontracting clauses that

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[10]*Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (AFL-CIO), (Greater Muskegon General Contractors Assn.),* 152 NLRB 360 (1965); *Ets-Hokin Corporation,* 154 NLRB 839 (1965); *Local 437, International Brotherhood of Electrical Workers, AFL-CIO (Dimeo Construction Co.),* 180 NLRB 420 (1969); *General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J.K. Barker Trucking Co.),* 181 NLRB 515 (1970); *Fresno, Madera, Kings and Tulare Counties Building and Construction Trades Council (Gage Brothers Construction),* 218 NLRB 39 (1975); *International Union of Operating Engineers, Local No. 12 (Robert E. Fulton),* 220 NLRB 530 (1975).

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[11]See *Muskegon Bricklayers Union #5, supra,* enfd. 378 F.2d 859 (C.A. 6, 1967); *Ets-Hokin Corp.,* enfd. *sub nom. N.L.R.B. v. International Brotherhood of Electrical Workers, AFL-CIO and its Local Union No. 769,* 405 F.2d 159 (C.A. 9, 1968).

violations of Section 8(e) will be found.[12] The Board has found that "self-help" clauses remove otherwise proviso-protected agreements from the scope of that proviso even though the self-help and subcontracting provisions are found in different articles of the agreement,[13] even if the remedy the union seeks would be the same if achieved by lawful judicial means,[14] and although the means of enforcement reserved by the union were not strictly limited to strikes or picketing.[15]

In the instant case, while the limitations on subcontracting are technically linked to the contract's grievance-arbitration machinery, article IX nonetheless reserves to the Union the right to take "whatever action it deems necessary" for enforcement at any step of the grievance procedure or for a violation of the applicable time limits for fringe benefit contributions. Furthermore, while article X, section 1, generally provides for no strikes, it is limited by the language "unless otherwise provided herein." Article IX, in turn, allows for whatever action deemed necessary for enforcement with the understanding that such action shall "not be considered in violation of *any part* of this agreement." (Emphasis supplied.)

Taken together, articles IX and X compel the conclusion that strikes or other economic action which would otherwise be prohibited under article X are allowed under article IX as an "action deemed necessary" by the parties to enforce the grievance-arbitration procedure. Further, it is clear that a dispute arising under the Article VIII restrictions on

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[12]*General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, supra.*

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[13]*International Union of Operating Engineers, Local Union No. 12 (Robert E. Fulton), supra.*

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[14]*Muskegon Bricklayers Union #5, supra.*

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[15]*Fresno, Madera, Kings and Tulare Counties Trades Council, supra.*

subcontracting would be submitted to the grievance-arbitration procedures for settlement. If one party subsequently failed to comply with the settlement, the other party, under article IX, is accorded the right to take "any action deemed necessary" to enforce the settlement.

As noted above, Respondent Engineers contends that any economic action that the Union may choose to employ is not strictly to enforce the subcontracting provision in article VIII, but is instead action taken to enforce the findings and/or time limits grounded in the grievance-arbitration provision. Engineers in effect argues that a violation of Section 8(e) is avoided here because the Union has not reserved the use of economic force with respect to the subcontracting clause *per se*, but has reserved the right to take self-help as it relates to the grievance-arbitration provision.

The grievance-arbitration procedure, however, is simply an agreed-upon method for the resolution of disputes arising under specific provisions of the contract between the parties. As such, it is necessarily connected to the contract provisions which are the source of the disputes submitted for resolution. We therefore hold that the immediate object of a self-help clause (here, the grievance procedure) will not serve to obscure the underlying dispute which gives rise to a claim of liability (in this case, the enforcement of a secondary clause). The effect of a holding to the contrary would be to insulate self-help clauses (as applied to secondary provisions) through the device of the grievance procedure. Read together, articles VIII, IX, and X sanction economic action to insure compliance with the subcontracting provisions of article VIII. This result serves to remove article VIII from the protection it would otherwise enjoy under the proviso to Section 8(e). Recalling that in its enactment of the proviso to Section 8(e) Congress intended that agreements privileged by that proviso be enforced only through lawsuits, it is clear that if the underlying claim giving rise to liability under article IX, section 5, is rooted in a secondary clause the fact that there is an intermediate stage before the Union may resort to economic action does not alter the fact that the contract allows the Union to employ "non-judicial acts of a compelling or

restraining nature, applied by way of concerted self help"[16] for the enforcement of a secondary provision. Accordingly, we find that article VIII of the 1975–80 AGC-Engineers agreement is violative of Section 8(e) of the Act.[17]

The Remedy

Having found that Respondents have engaged in unfair labor practice, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

Conclusions of Law

1. The Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., is an association of employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local No. 701, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By entering into, maintaining, and giving effect to self-help provisions applicable to article VIII of their 1975–80 collective-bargaining agreement, Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL-CIO, violated Section 8(e) of the Act.

4. The above unfair labor practice is an unfair labor practice affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

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[16] *Local Union No. 48, Sheet Metal Workers International Assn. v. Hardy*, 332 F.2d 682 (C.A. 5, 1964).

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[17] Member Murphy emphasizes that all five Board Members, including her dissenting co-league, agree that the actual use of economic action to enforce a clause protected by the construction industry proviso under Sec. 8(e) violates the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and mail to its employer-members copies of the attached notice marked "Appendix A."[18] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent AGC, shall be posted and mailed immediately upon receipt thereof, and those posted shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondent AGC to insure that said notices are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for Region 19, in writing within 20 days from the date of this Order, what steps Respondent AGC has taken to comply herewith.

B. Respondent International Union of Operating Engineers, Local No. 701, AFL-CIO, Portland, Oregon, shall:

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[18]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

1. Cease and desist from entering into, maintaining, giving effect to, or enforcing the self-help portion of article IX, section 5, insofar as it is applied to the subcontracting clause, article VIII, found in Respondents' collective-bargaining agreement, to the extent found unlawful herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[19] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent Engineers, shall be posted immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Engineers to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent Engineers has taken to comply herewith.

Dated, Washington, D.C. November 13, 1978

CHAIRMAN FANNING, dissenting:

I agree with the finding that the Supreme Court decision in *Connell* construed the construction industry proviso to permit subcontracting clauses in the context of a collective-bargaining relationship as in this case. However, for reasons stated in my dissenting opinion in *Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (AFL-CIO) (Greater Muskegon General Contractors Association),* 152 NLRB 360 (1965), I dissent from the finding that the subcontracting clauses are outside the protection of the proviso because of self-enforcement provisions. Accordingly, I would dismiss the complaint.

Dated, Washington, D.C. November 13, 1978

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[19]See fn. 18, *supra.*

Appendix A

Notice to Employees and Members

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce that portion of article IX, section 5, permitting "such action as (deemed) necessary," to the extent that such action is authorized to maintain, to give effect to, or enforce the subcontracting clause, article VIII, of the collective-bargaining agreement between Oregon-Columbia Chapter, The Associated General Contractors of America, Inc., and International Union of Operating Engineers, Local No. 701, AFL-CIO, and to the extent that article IX, section 5, violates Section 8(e) of the National Labor Relations Act.

OREGON-COLUMBIA CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206–442–7472.

APPENDIX H: OPINION OF THREE JUDGE PANEL

Before the United States Court of Appeals for the Ninth Circuit

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner

v.

National Labor Relations Board, Respondent

(Remainder of title omitted in printing)

Before: SNEED and KENNEDY, Circuit Judges, and EAST,* District Judge

SNEED, Circuit Judge:

Construction contractors challenge in these cases the legality of a provision in a collective bargaining agreement which prohibits a signatory contractor from assigning work to subcontractors unless the subcontractors have a collective bargaining agreement with the signatory union. The National Labor Relations Board has ruled that such a provision does not violate the prohibition in the National Labor Relations Act (the Act) against "hot cargo" agreements.[1]

In deciding these cases we must determine the scope of the Supreme Court's holding in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). We hold that under *Connell* the clauses before us are not lawful under section 8(e) of the Act, 29 U.S.C. § 158(e), and are not within the construction industry proviso of section 8(e).

Our jurisdiction rests on 29 U.S.C. § 160(e) and (f) (1976).

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

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[1]A hot cargo provision, so named because of the prevalence at one time of such provisions in Teamsters Union contracts, is an agreement between a union and an employer by which the employer promises not to use the materials—or, as in this case, the services—of nonunion employers.

I.
Factual Background

Two decisions of the Board are before us for review. The first considered the legality of a collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC), which is an association of approximately 200 employers engaged in construction in Oregon and southwest Washington, and the International Union of Operating Engineers, Local 701 (Engineers). The agreement, effective from June 1, 1975 through May 31, 1980, contains a provision precluding AGC employers from assigning jobsite work covered by the agreement to any subcontractor which does not have a current labor agreement with Engineers.[2] Another provision makes violations of the agreement subject to a grievance and arbitration procedure, and the results of arbitration are enforceable by "such action as they [the parties] deem necessary . . ." This article would thus permit enforcement of the agreement, including the subcontractor clause, through strikes or picketing.

Following a charge filed by another association of construction employers, the General Counsel of the NLRB issued a complaint alleging that the agreement's subcontractor clause and enforcement provision violate section 8(e) of the Act.[3] The case was heard by the Board upon stipulated facts and

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[2]The subcontractor clause provides in pertinent part as follows:

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

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[3]Section 8(e) provides in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or

it held that, while the subcontractor clause fell within the general proscription of section 8(e), the clause was protected by the section's construction industry proviso. However, the Board invalidated the self-help enforcement provision insofar as it authorized economic sanctions in support of the subcontractor clause. All parties petitioned this court for review and modification of the Board's order. The Board, of course, seeks enforcement of its order.

The second decision of the Board which we review considered challenges to a proposed collective bargaining agreement which locals of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), sought to establish with Woelke & Romero Framing, Inc. (Woelke), a framing subcontractor who has performed work for various construction contractors in southern California. Between 1974 and 1977, Woelke was a party to a collective bargaining agreement with Carpenters. This agreement was due to expire on June 15, 1977, and, beginning on June 3, 1977, Woelke commenced negotiations with Carpenters concerning a successor arrangement. Two provisions of the proposed new agreement generated contention. One of these provisions forbade Woelke to subcontract jobsite work except with firms having a current labor agreement with Carpenters.[4] The second

> otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .
>
> 29 U.S.C. § 158(e) (1976).

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants,

provision included foremen within the unit of employees whom Carpenters would represent. According to the parties' stipulations, foremen function as supervisors and also as Woelke's selected representatives for purposes of collective bargaining or the adjustment of grievances. Impasse over these provisions led to the termination of negotiations on August 4, 1977. Thereafter, Carpenters picketed Woelke at four jobsites. As a consequence of this picketing, employees of the subcontractors of general contractors at two of the jobsites refused to work.

Upon charges filed by Woelke, the General Counsel of the NLRB issued a complaint against Carpenters. After hearing the case upon stipulated facts, the Board decided that the proposed subcontractor clause was protected by the construction industry proviso. It follows, the Board held, that picketing by Carpenters did not violate the prohibition in section 8(b)(4)(i) and (ii)(A) of the Act, 29 U.S.C. § 158 (b)(4)(i) and (ii)(A).[5] Before reaching

> asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The proposed agreement also contains an alternative subcontractor clause, applicable in the event that the principal clause should be invalidated, which would prevent subcontracting with any firm unless the firm's employees belong to a union and unless the subcontractor agrees to comply with the full terms of the labor agreement between Woelke and Carpenters. We accept the Board's conclusion that the alternative provision is merely a disguised union signatory clause, since in practice only a subcontractor affiliated with Carpenters could satisfy its requirements, some of which are unrelated to any legitimate primary interest of the bargaining employees.

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[5]Section 8(b)(4)(i) and (ii)(A) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry

this conclusion the Board held that but for the construction industry proviso the proposed subcontractor clauses would violate section 8(e).

In addition, the Board concluded that bargaining to impasse and picketing intended to compel the unionization of Woelke foremen constituted a violation of section 8(b)(l)(B) of the Act, 29 U.S.C. § 158(b)(1)(B),[6] and ordered Carpenters to desist from this practice.

The Board requests enforcement of this order. Woelke seeks reversal of the Board's decision with respect to the subcontractor clause.

We shall discuss first the critical issue of these cases, *viz.* the scope of the construction industry proviso as applied to the subcontractor clauses involved in each case. Thereafter the remaining issues pertinent to each case will be addressed.

II.

Scope of the Construction Industry Provisio

Our analysis will proceed as did that of the Board. That is, we shall initially determine whether these clauses fall within the

> affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); . . .
>
> 29 U.S.C. § 158(b)(4)(i) and (ii)(A) (1976).

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[6]Section 8(b)(1)(B) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances [sic]; . . .
>
> 29 U.S.C. § 158(b)(1)(B) (1976).

general proscription of section 8(e) and, inasmuch as we agree with the Board's conclusions that section 8(e) does proscribe these clauses, we shall then determine whether the clauses are, nonetheless, protected by the construction industry proviso. As already indicated, our conclusion with respect to the scope of the proviso differs from that of the Board.

A. Does Section 8(e) Proscribe These Clauses?

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. Reading section 8(e) literally there is no doubt but that section 8(e) proscribes such clauses. The problem is not that simple, however. In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), the Supreme Court read into section 8(e) a distinction between primary and secondary objectives. An agreement which advances only primary objectives of the bargaining employees, such as preserving work opportunities, is not unlawful. Thus, a court must consider:

> ... whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements ... were tactically calculated to satisfy union objectives elsewhere. Were the latter the case [the contracting employer] ... would be a neutral bystander, and the agreement ... would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer ... for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees of the primary employer thus making the agreement or boycott secondary in its aim. The touchstone is whether the agreement is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees.

Id at 644-45 (citations omitted).

Applying this standard, this court has recognized that a union signatory clause — as opposed to a union or area standards

clause, which merely requires that the employees of subcontractors work under the same terms and conditions as those enjoyed by union members—is normally secondary in nature. *Griffith Co. v. NLRB*, 545 F.2d 1194, 1199 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977). As the Second Circuit observed in *NLRB v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974): "[i]f the clause is a union signatory clause, the union has an interest, independent of the interests of the employees being represented, in furthering its own organizational ends or in protecting the interests of its other bargaining units."

Nor can these clauses be regarded as valid work preservation provisions. They do not assure work opportunities for employees in the respective work units, i.e., employees of AGC or of Woelke; rather, they operate for the general benefit of the respective unions. Hence, neither provision is directed to "the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturers*, 386 U.S. at 645. We agree with the Board, therefore, that the subcontractor clauses fall within the general prohibition of section 8(e).

B. Does the Construction Industry Proviso Authorize These Clauses?

1. The Interpretation Required by Connell Construction Co.

In determining whether these subcontractor clauses are protected by the construction industry proviso, we encounter the Supreme Court's decision in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). There the union, as a result of picketing, had obtained a subcontractor agreement with a general building contractor even though the union did not represent or seek to represent the contractor's own employees. When the contractor challenged the agreement under the Sherman Act, the union defended, in part, by arguing that the agreement was expressly authorized by the construction industry proviso. Declaring that "section 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment," *id.* at 628, the Supreme Court

observed that the section was part of a program enacted to limit "top-down" organizing campaigns. The construction industry proviso, though an exception to the section's general proscription, should be construed so as not to undermine that objective. *Id.* at 628-33. The Court concluded that the subcontractor clause in that case was not covered by the proviso. It expressed its holding in the following manner:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only of firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

Id. at 635.

The Board in the cases here being reviewed emphasized heavily the Supreme Court's reliance on the absence of a collective bargaining relationship. Where this relationship exists it held union signatory clauses were within the construction industry proviso. The Board stated:

> "The bottom line of the Court's opinion, as we construe it, is that the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective bargaining relationship, and possibly without such a realtionship if the clauses are aimed at avoiding the Denver Building Trades [*NLRB v. Denver Building Trades*, 341 U.S. 675 (1951)] problems."[7]

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[7]The unions and the Board purport to find support for this interpretation of Connell in California Dump Truck Owners Ass'n v. Associated General Contractors of America, 562 F.2d 607 (9th Cir. 1977). Declining to find challenged provisions of a labor agreement unlawful under the antitrust statutes, this court in *Dump Truck* distinguished *Connell* with the observation that in *Connell* no collective bargaining relationship had existed. *Id.* at 613. However, *Dump Truck* did not involve interpretation of section 8(e), and its quotation from *Connell*

We disagree. We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subconcontractor. It follows that under our holding a general contractor, who does not use at any time on a particular jobsite his employees who are members of the signatory union, and does not engage subcontractors whose employees are members of the signatory union, can engage nonunion subcontractors to perform work on that particular jobsite that otherwise would be done by members of the signatory union. To do so would not, in our opinion, violate a valid union signatory clause. To hold otherwise extends the construction industry proviso beyond the limits we attribute to *Connell*.

Our holding recognizes the validity of a provision in a collective bargaining agreement that with respect to any particular jobsite will preclude the possibility of members of the signatory union being required to share work with nonunion workers. Under a provision of this sort the employment of one member of the signatory union on the jobsite assures that all relevant work on that jobsite will be done by signatory union members. We believe this is a more accurate reading of Connell's holding than that of the Board.

was taken from a section of the *Connell* opinion which was not concerned with section 8(e). Moreover, the provision challenged in *Dump Truck* was not a union signatory clause; the provision did not prohibit employers from using nonunion subcontractors but merely required that such subcontractors receive a rate of pay not less than that of union employees, and that the union be notified when a non-union subcontractor was employed. *Id.*

We are not aware, moreover, of any decision of any other court of appeals which has read *Connell* as construing the construction industry proviso so as to protect all subcontractor agreements made in a collective bargaining context. The district courts which have considered the question have reached contrary conclusions. *Compare, e.g.*, Long v. Floorcraft Carpet Co., 82 Labor Cases ¶ 10,044, p. 16,151 (D.C. Ore. 1977), *with* In re Bullard Contracting Corp., 464 F. Supp. 312 (W.D.N.Y. 1979).

We acknowledge that the teaching of *Connell*, as applied to the issue we are considering, is not unambiguous. The Court stated that the construction industry proviso applies only to work performed at the jobsite and then added, quoting *Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir 1966), that some courts had assigned the proviso the "even narrower function" of alleviating "'the frictions that may arise when union men work continuously alongside nonunion men on the same construction site.'" *Connell*, 421 U.S. at 630. The Court's statement left open this "even narrower" view of the proviso's scope. However, since the subcontractor agreement in *Connell* occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What *Connell* left unanswered we must confront and answer.

2. Reasons In Support of Our Holding

We believe our response is supported by the proviso's background and statutory setting. Section 8(e) was enacted as part of the Labor-Management Reporting and Disclosure Act of 1959. The section was designed, as the Supreme Court noted in *Connell*, to strengthen the prohibition in section 8(b)(4) against secondary activities by forbidding agreements which might be used to circumvent that section's ban on the use of economic coercion for secondary objectives. *Id.* at 628. However, the prohibition in section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and the more limited exception for the construction industry.

The unions and the Board contend that, at least with respect to agreements made within the context of collective bargaining, the proviso should be given the expansive scope which its literal terms suggest. Their argument can be stated syllogistically: At the time the proviso was enacted, the union signatory subcontractor provisions were lawful. The proviso was intended to preserve in the construction industry the law as it then existed. Hence, the proviso was intended, and should be construed, to protect subcontractor provisions.

The difficulty with this argument is that neither of the premises can be accepted without qualification. In 1959, when section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined. *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), the so-called *Sand Door* case which in the unions' view defined the state of the law at that time, involved an agreement forbidding the use of nonunion material, not a subcontractor provision. Moreover, the issue in *Sand Door* was whether union picketing and coercion designed to enforce a hot cargo provision was unlawful under section 8(b)(4), and the Court, although it indicated that a hot cargo clause was not *prima facie* evidence of illegal coercion under section 8(b)(4), *id.* at 108, expressly declined to consider "the invalidity of hot cargo provisions as such." *Id.* at 107. Thus, the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door.*

Furthermore, even if subcontractor clauses were lawful prior to the passage of the Labor-Management Reporting and Disclosure Act, it is unclear to what extent the construction industry proviso was intended to preserve the then current law. The unions rely upon statements made by Senator Kennedy and an extract from the Conference Report which suggest that the provisio would not change the law of the *Sand Door* decision. Yet in explicitly limiting the proviso's protection to jobsite work, Congress adopted a restriction which was never mentioned in *Sand Door.* Indeed, in the same paragraph which indicates that the law of *Sand Door* would be preserved, the Conference Report states that the proviso would not protect "agreements relating to supplies or products or materials . . . delivered on the site of the construction," which was precisely the kind of agreement at issue, and allegedly declared to be lawful, in *Sand Door.* H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, *reprinted in* I Legislative history of the Labor-Management Reporting and Disclosure Act of 1959 at 943 (1959). Hence, the broad assertion that the construction industry proviso was designed to leave the law unchanged is inaccurate. Congress may have intended to preserve existing

law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is.

We must, therefore, look to the purpose Congress sought to serve by enacting an exception for the construction industry. In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), this court surveyed the legislative history of section 8(e) and concluded:

> Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, "the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site." Drivers, Salesmen, Etc., Local 695 v. NLRB, 124 U.S. App.D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the union laborers are in frequent and relatively close contact with the union craftsmen.

The court's conclusion in *ACCO* is consistent with the Supreme Court's reasoning in *Connell*. *Connell* noted that the construction industry proviso resulted from efforts to overrule the holding of *NLRB v. Denver Building Trades Council*, 341 U.S. 675 (1951), in which the Supreme Court had ruled that union picketing which was intended to force a general construction contractor to terminate its contract with a nonunion subcontractor violated section 8(b)(4). *Connell*, 421 U.S. at 629. The *Denver Building Trades* decision was objectionable because, as Justice Douglas had argued in dissent, "[a]ll the union asked was that union men not be compelled to work *alongside nonunion men on the same job*." *Denver Building*

Trades, 341 U.S. at 692 (emphasis added). Thus, the purpose of the proviso was to permit unions and construction employers to avoid the tension and discontent that exists when members of a union are required to work on the same jobsite with nonunion workers of the same craft or trade.[8] Our holding permits the avoidance of precisely that source of tension and discontent.

We cannot extend the provisio's protection beyond the purpose for which the exemption was created without creating a shield of immunity for agreements which we believe Congress wished to prohibit. Hence, the purpose of the exception dictates its scope. A subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect. If a general contractor assigns work on a construction site only to nonunion subcontractors, the problem of jobsite friction between union and nonunion employees of a particular craft or trade does not

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[8]The employer petitioners argue further that the proviso was not intended to protect *particular union* clauses, i.e., agreements which require that an employer's subcontractors belong not merely to a union, but to the union which is party to the labor agreement containing the subcontractor proviso. This interpretation is based upon several statements by Senators indicating that the proviso would protect agreements precluding the use of "nonunion" (or, in a single instance, "unorganized") subcontractors. The employer petitioners interpret the term "nonunion" to refer only to firms not belonging to any union, and then make the negative inference that the proviso does not protect subcontractor clauses forbidding the use of firms which, though not associated with the signatory union, are not "nonunion" firms in this narrow sense. This inference is dubious at best and, in any event, the fragments of legislative history upon which these parties rely do not constitute conclusive evidence of the understanding of Congress as a whole. Moreover, this view of the exception would frustrate the purpose of the proviso, because jobsite friction might arise between members of competing unions as well as between union and nonunion workers. We therefore decline to take this restrictive view of the proviso's scope.

arise. Indeed, a general contractor that assigns no employees who are members of the signatory union to a particular construction project occupies the same position, with respect to that project and the signatory union, as the contractor in *Connell* which had no union employees at all. The fact that a contractor may employ signatory union personnel elsewhere is, for purposes of the proviso, irrelevant.

We find additional support for our interpretation of the construction industry exception in the proviso's statutory setting. Section 7 of the Act, 29 U.S.C. § 157, provides, with limited exceptions, that employees have the right to refrain from any or all union activities. In addition, if employees choose to unionize, they have the right to bargain "through representatives of their own choosing . . ." Although section 8(f) of the Act, 29 U.S.C. § 158(f), permits "pre-hire" labor agreements in the construction industry, that section does not override the workers' rights of self-determination. *Connell*, 421 U.S. at 632. A union signatory subcontractor clause operates to force nonunion firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. The agreement between AGC and Engineers, for instance, forecloses to nonunion firms employment opportunities with any of 200 construction contractors throughout Oregon and southwest Washington. The potential coercive effect of such a provision is manifest. The clause is thus precisely the kind of instrument for "top-down" organizing which the Supreme Court condemned in *Connell*. *Id.* at 631, 632. For those reasons, we believe that the position taken by the Board, which legitimates the use of such an organizing weapon by a union as long as the union has a collective bargaining relationship with the signatory employer, is improper.

III.
Remaining Issues

Having decided the principal issue raised by these cases, we now consider the proper disposition of each of the cases before us.

For the reasons elaborated in the preceding section, the subcontractor clause contained in the collective bargaining agreement between AGC and Engineers constitutes a violation of section 8(e). The clause in its present form, as section 8(e) provides, is unenforceable. Hence, we need not decide whether the agreement's self-help enforcement provision as applied to a lawful subcontractor clause would violate section 8(e).

The subcontractor provision proposed by Carpenters in negotiations with Woelke is also unlawful under section 8(e). Picketing engaged in by Carpenters in order to compel Woelke to accept the provision was thus a violation of section 8(b)(4)(i) and (ii)(A), and should have been enjoined by the Board. The Board's order is accordingly modified to enjoin Carpenters from picketing or using economic coercion for the purpose of inducing Woelke to enter into any agreement which contains such a provision. Our disposition of this issue makes it unnecessary to consider Woelke's additional contention that picketing intended to compel acceptance even of a lawful subcontractor clause is prohibited by section 8(b)(4)(i) and (ii)(A).

The Board requests enforcement of its order enjoining the use by Carpenters of picketing, strikes, or other coercion in order to compel Woelke to include within the bargaining unit foremen who are supervisors or Woelke's representatives for purposes of collective bargaining or the adjustment of grievances. Carpenters has not contested the Board's ruling that picketing or coercion used for this purpose constitutes a violation of section 8(b)(1)(B) of the Act. The Board's order with respect to this issue should be enforced.

The Board shall modify its orders in these cases to conform to the views expressed in this opinion, and those orders, as modified, are ordered enforced.

Enforced As Modified.

APPENDIX I: OPINION OF THE EN BANC PANEL

Before the United States Court of Appeals for the Ninth Circuit

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner

v.

National Labor Relations Board, Respondent

(Remainder of title omitted in printing)

BEFORE: BROWNING, Chief Judge, CHOY, WALLACE, SNEED ANDERSON, SCHROEDER, FLETCHER, FARRIS, NELSON, CANBY and NORRIS, Circuit Judges

CANBY, Circuit Judge

These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry proviso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontact work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.

Facts.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200

employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargaining agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

Article VIII

Subcontractors and Other Employers.

Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

Subsequent clauses[1] provide for a grievance procedure leading to arbitration and further provide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings . . . ." The effect of the latter provision is to permit

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[1]Other relevant clauses of the AGC agreement are:

ARTICLE IX

Settlement of Disputes

Grievance Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * * *

Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party . . . , then all means of arbitration shall be considered exhausted.

Either party may take such action as they deem necessary to enforce the findings . . . and they shall not be considered in violation of any part of this Agreement.

ARTICLE X

Strikes and Lockouts

Section 1. Unless other wise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement . . . .

either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e)[2] of the National Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work ...." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and

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[2]Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work ...

Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters), a group which included Locals Number 235 and 944 involved in this litigation. That agreement expired on June 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse over several issues.[3] One such issue was the union's demand for a clause in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locals were charged with violation of § 8(b)

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[3]Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foremen in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

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[4]The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

(4)(i) and (ii)(A) of the Act[5] for picketing to require an employer "to enter into an agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso, and that picketing to obtain such a clause therefore did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

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[5]Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or other wise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing ....

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[6]Along with the present cases, reported at 239 N.L.R.B. 274 (1978) *(Pacific Northwest)* and 239 N.L.R.B. 241 *(Woelke)*, the Board decided *Los Angeles Building Construction Trades Council (Donald*

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because their applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate § 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1633 and Rule 25 of this court.

II.

Issues.

Four issues are presented for determination in these cases:

(1) Are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) to enforce them by picketing or strikes?

Schriver, Inc.), 239 N.L.R.B. 264 (1978), and *Colorado Building Construction Trades Council*, 239 N.L.R.B. 253 (1978). The Board's order upholding broad subcontractor agreements in *Schriver* was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. *Donald Schriver, Inc. v. NLRB*, Nos. 78-2177, 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

III.

Applicability of § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangements that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The Court therefore held that an agreement between a union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to preserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as primary and therefore did not constitute an unfair labor practice.[7] The test whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* at 645. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisiy union objectives elsewhere." *Id.* at 644.

By the *National Woodwork* test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees of the contracting employer by limiting the amount of subcontracting. Nor do they

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[7] "Union standards" clauses, which require that an employer not subcontract with any one whose wage and benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. *Truck Drivers Union Local No. 413 v. NLRB*, 334 F.2d 539, 548 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964); *NLRB v. National Maritime Union*, 486 F.2d 907, 912 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

seek to protect the wage and benefit standards of those same employees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives involving employees and employers outside of the bargaining or work unit. *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976), *cert. denied*, 434 U.S. 854 (1977); *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. *NLRB v. National Maritime Union*, 486 F.2d at 914. Second, § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in *NLRB v. Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that the clause falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation for the

employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union*, 196 N.L.R.B. 1100, 1101 (1972), enforced 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. *See NLRB v. National Maritime Union, supra*, at 913-14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, *NLRB v. Denver Building Construction Trades*, 341 U.S. 675 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon their eligibility for inclusion within the construction industry proviso to that section.

IV.

Scope of the Construction Industry Proviso to § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). Indeed, it is the effect of *Connell* that provides the primary ground of controversy in the present litigation. We believe, however, that the *Connell* decision is best analyzed after a review of the state of the industry and the legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959); *I Legislative History of The Labor-Management Reporting and Disclosure Act of 1959* 423 (hereinafter Leg. Hist.). These peculiarities of the construction industry created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisy [sic] these needs, unions and employers hammered out a number of mutual accommodations. One such arrangement was the closed shop,

which was prevalent in the industry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular employers.[10] A third device was the agreement to restrict subcontracting in various ways—to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially caused no disruption in the

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[8]Haber, Industrial Relations in the Building Industry 238-40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. *Id.* at 240.

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[9]Dunlop, *The Industrial Relations System in Construction,* in The Structure of Collective Bargaining 255, 256-57 (Weber ed. 1961).

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[10]S. Rep. No. 187, *supra,* 28; I Leg. Hist. 424. *See generally,* Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

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[11]A union attempt to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. *Levering Garrigues Co. v. Morrin,* 71 F.2d 284 (2d Cir.), *cert. denied,* 293 U.S. 595 (1934).

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[12]Marcus, *Secondary Boycotts,* in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961)(hereinafter referred to as LMRDA Symposium).

pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over that industry.[13] The Taft-Hartley Amendments to the Act, passed in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refrain from dealing in the products of any other employer or to cease to do business with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. *Guy F. Atkinson Co. and J.A. Jones Construction Co.*, 90

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[13] *Brown and Root, Inc.*, 51 N.L.R.B. 820 (1943); *Johns-Manville Corp.*, 61 N.L.R.B. 1 (1945).

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[14] The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 *supra*.

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[15] Denham, *Taft Act's Impact on the Construction Industry, reprinted in* 21 L.R.R.M. 44 (1948). The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board decided United *Ass'n of Journeymen Apprentices of Plumbing and Pipefitting Industry (Brown-Olds)*, 115 N.L.R.B. 594 (1956), and *Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific)*, 119 N.L.R.B. 883 (1958), *remanded on other grounds*, 270 F.2d 425 (9th Cir. 1959). Apruzzese, *The LMRDA and the Building and Construction Industry*, LMRDA Symposium, note 12, *supra*, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. *See* Fenton, *Union Hiring Halls: NLRB Rules, Penalties*, 42 L.R.R.M. 101, 103 (1958).

N.L.R.B. 143 (1950), *enforcement denied on other grounds*, 195 F.2d 141 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. *NLRB v. Denver Building Construction Trades Council*, 341 U.S. 675 (1951). The picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the construction industry were sufficiently disruptive of existing practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong. Rec. 111, [1954] U.S. Code Cong. & Admin. News 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted ... under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S. Doc. 10, 86th Cong., 1st Sess.; 105 Cong. Rec. 1297; I Leg. Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time—that of limiting "hot cargo" agreements.

In June 1958, the Supreme Court had decided *Local 1976, United Brotherhood of Carpenters v. NLRB, (Sand Door)*, 357 U.S. 93. *Sand Door* stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, id. at 107, *Sand Door* was widely

interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished the congressional purposes in various ways. The clearest accommodation to the peculiar conditions of the construction industry was found in § 8(f),[16] which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts to an exception to § § 8(a)(1),(2) and

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[16]Section 8(f), 29 U.S.C. § 158(f), provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective bargaining agreement before the union represents a majority of employees in the unit. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961); *see NLRB v. International Association of Bridge, Structural Ornamental Iron Workers*, 434 U.S. 335, 344-45 (1978). Section 8(f) also shortened to 7 days the period for nonunion workers to join the union under a union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the *Sand Door* decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry

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[17]S. 1555, 1 Leg. Hist. 582.

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[18]H.R. 8342 as amended by H.R. 8400, I Leg. Hist. 683.

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[19]H.R. Rep. No. 1147 (Conference Report) 86th Cong., 1st Sess. 38-40; I Leg. Hist. 942-44 (1959).

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[20]The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states:

Provided further, That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry ....

proviso excepted agreements "relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work .... "

It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed at the construction site. Although the matter is not free from doubt, we believe that the legislative history favors the latter view.

(C) Legislative Discussion of the Construction Industry Proviso.

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong. Rec. 17899; II Leg. Hist. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements

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[21]There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. *See, e.g.*, 105 Cong. Rec 17381, II Leg. Hiwt. 1385 (Senators Javits and Goldwater); 105 Cong. Rec. 15538, II Leg. Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong. Rec. 15848; II Leg. Hist. 1680 (Rep. Teller).

between a union and an employer by which the employer would boycott others. The Conference Committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements ... To the extent that such agreements are legal today under section 8(b)(4) ... , the proviso would prevent such legality from being affected by section 8(e).

H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39; I Leg. Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> ...
>
> *Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be Legal today. They will not be unlawful under § 8(e) ....*
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> ...
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> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

105 Cong. Rec. 17900; II Leg. Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary objectives, which meant that the holding of *Denver Building*

Trades, supra, was left in effect. On the other hand, the Conference Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The *Sand Door* decision, *supra,* which supplied much of the impetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. *Operating Engineers Local Union No. 3 v. NLRB,* 266 F.2d 905 (D.C. Cir.), *cert. denied sub nom. St. Maurice v. NLRB,* 361 U.S. 834 (1959).[22] While that case dealt

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[22]The *Engineers* decision was submitted to the House committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation, 803-07 (1959) (herafter [sic] House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in *Engineers,* appeared before the Committee and testified as to the scope of the subcontracting clause:

> The contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses [sic] says that any time an AGC contractor subcontracts work the

with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement, the Court erred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms complying with the terms of the prime employer's agreement. Lunden, *Subcontracting Clauses in Major Contracts,* 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The

> subcontractor must agree to apply the terms and conditions of the AGC operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers local 3.
>
> Since about 1955, the AGC and the Operating Engineers *have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.*
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> 5 House Hearings 2366 (Emphasis supplied).
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> Although the *Engineers* decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's attention. Senate Hearings 752 (Testimony of Sen. Curtis).

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[23]Office of the General Counsel, Memorandum 76-57, December 15, 1976, *reprinted in* Labor Ralations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards clauses, the General Counsel found that study "inconclusive." *Id.* at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. *Id.* at 309.

survey canvasses various limitations appearing in subcontracting clauses in the construction industry, but makes no mention of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. *Id.* at 715-16. That there may not have been a consistent pattern of subcontractor agreements of the type in issue here is not crucial What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) The Connell Decision.

It was against this industrial and legislative background that the Supreme Court decided *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Connell was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees. The picketing was successful and the contractor sought to annul the ensuing agreement on the grounds that it violated the antitrust laws.[24]

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[24] *Connell* was another chapter in the dispute in Dallas between building contractors and trade unions. In *Dallas Building Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968), a clause similar to the one in *Connell* was at issue. Unlike Connell, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days by § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the unions picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General

One of the defenses raised by the union was that the agreement could not be a violation of the antitrust laws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme Court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attack the subcontracting clauses in the present case argue that *Connell's* language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So interpreted, *Connell* would invalidate the agreements in issue here at least until the presence of union workers at a particular jobsite triggered their application. We concede at the outset that the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the *Connell* decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevailing thrust of *Connell* is to the contrary and favors a broader [sic] view of the exemption. Our conclusion is supported in particular by the *Connell* opinion's emphasis on the absence of a collective bargaining relationship, its references to legislative history, and its characterization of the interests served by the

Counsel refused to issue a complaint. *See Connell,* 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631-32 n. 10.

When Local 100 began picketing Connell, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of *Connell* from the present cases is that the agreements in *Connell* arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in *Connell*:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

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[25]But for the *Connell* decision, we would have no difficulty in enforcing the Board's order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. *See, e.g., Construction, Production Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); Suburban Title Center Inc., v. Rockford Building Construction Trades Council, 354 F.2d 1, 2-3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966); *United Association of Journeymen Apprentices of the Plumbing and Pipefitting Industry, Local 48*, 190 N.L.R.B., 415, 416-17 (1971).

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[26]*See Connell*, 421 U.S. at 622-23; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and section 4, 5 and 13 of the Norriss-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. *Connell, supra*, 622-23. *See generally*, R. Gorman, Basic Text on Labor Law, 621-31 (1976).

421 U.S. at 626.[27] The focus of the *Connell* decision was therefore understandably upon the situation created by subcontracting clauses in the absence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of *Connell*, however. The parties themselves had framed the issues toward the same end. The union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship . . . ," but not those involving a "stranger" contractor. *Id.* at 627.[28] The subject of controversy, then, was the validity of subcontractor agreements *outside* of the collective bargaining context, and the *Connell* opinion must to a large degree be read

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[27]The fact that *Connell* was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, *infra* p. ____ , but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, of course, is frequently contrary to that of the antitrust law. *See* St. Antoine, *supra*, n. 26.

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[28]The briefs in *Connell* concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to *Connell*. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished in the *Connell* opinion as being " . . . addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10. (emphaiss in original).

in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold that this agreement, which is outside the context of a collective bargining relationship and not restricted to a particular jobsite, ... may be the basis of a federal anti-trust suit ....

Id. at 635. The holding of *Connell,* then does not in the strict sense control the cases before us.

The *Connell* opinion did, however, discuss at length the reach of § 8(e) and its construction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language of *Connell* and apply it to the situation of the cases at bar where a collective bargaining relationship existed between the unions and the contractors with whom the agreements were sought.[29] A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of *Connell,* remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the *Connell* opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between union and nonunion

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[29]In *Woelke,* the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during neogiations sic to renew the contract. In *Pacific Northwest,* the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in *Donald Shriver Inc. v. NLRB,* Nos. 78-2177 and 79-1001, slip op. (D.C. Cir. Oct. 20, 1980).

workers there. These two themes—the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite —are interwoven in *Connell* as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer—contractor or subcontractor—is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As Congress recognized in passing § 8(f), collective bargaining cannot even await the presence of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand, the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. *National Woodwork, supra,* at 644-45; *National Maritime Union, supra.* We do not quarrel with this well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. *NLRB v. Denver Building Construction Trades Council,* 341 U.S. 675, 689 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside of the construction industry pursue secondary objectives.

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the *Connell* situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in *Connell* disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that *one* of these characteristics is that union workers are traditionally hostile to

the presence of non-union workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements may lead to multiple employers hiring a few workers for short periods of time,[30] and where working conditions applicable to one set of workers may very well affect others working on the same project.[31]

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[30]The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the average, each firm employed six construction workers. U.S. Bureau of the Census, Census of Construction Industries (1977), *cited in* Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.
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> . . . [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, *The Building Trades and Title VII of LMRDA*, in LMRDA Symposium, *supra*, note 12, at 1034, 1043.

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[31]*See Donald Schriver Inc., supra*, slip op. at 43-46.

We believe that the *Connell* opinion is sensitive both to the interconnection of interests between employees of the various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in *Connell* points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628-29. The legislative history discussed above indicates, we believe, that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in *Connell* dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that *Connell* was dealing with a case not considered by Congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the *Connell* opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to overrule" *Denver Building Trades*, 421 U.S. at 629. *Denver Building Trades* had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The *Connell* opinion refers to congressional discussion of special problems in the construction industry related both to the § 8(e) proviso and to

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[32] In *Connell*, the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in *Operating Engineers*, *supra*, as well as the House and Senate Hearings, *supra*, note 24, suggest that Congress was well aware of the existence of these clauses.

the attempt to overrule *Denver Building Trades*. That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secondary boycott ban is based upon the concept of two employers—a primary and a secondary employer. The theory is that a neutral employer should not be compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
>
> The case of the building and construction industry represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations. He lets those

[33]Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong. Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: *Douds v. Metropolitan Federation of Architects, Engineers, Chemists Technicians, Local 231, (Project Engineering Co.)*, 75 F. Supp. 672 (S.D.N.Y. 1948).

> contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong. Rec. 17880-81; II Leg. Hist. at 1425. Even where the sources cited by *Connell* deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the members in secondary employ. The memorandum by representatives Thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
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> ... [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong. Rec. 15541; II Leg. Hist. 1577. These materials cited by the *Connell* Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The *Connell* opinion quotes *National Woodwork Manufacturers, supra,* to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at 630, quoting 386 U.S. at 638-39. It is clear that the *Connell* opinion views the jobsite considerations of *National Woodwork* as going well beyond the problem of friction among workers,[34] because *Connell* next refers to some courts that have suggested that the proviso serves an "even narrower function"—the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* at 630, quoting *Drivers Local Union No. 695 v. NLRB,* 361 F.2d 547, 553 (D.C. Cir. 1966). The *Connell* opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the *Connell* case the union did not purport to represent *any* of the interests served by the proviso. 421 U.S. at 631.[35]

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[34]Indeed, *National Woodwork* contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32. That footnote refers to *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB,* 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. *The Impact of the Taft-Hartley Act on the Building and Construction Industry,* 60 Yale L.J. 673, 684-89 (1951), which discusses not only jobsite friction but also the additional considerations of interchangeability of workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employees at the jobsite.

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[35]Essentially the same situation was dealt with by this court in *ACCO Construction Equipment, Inc. v. NLRB,* 511 F.2d 848 (9th Cir. 1975). ACCO does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read

We believe that it would do some violence to the language of the *Connell* opinion to adopt the "even narrower" view of the construction industry proviso which the Court in *Connell* did not represent to be its own. Yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-to-shoulder jobsite friction can occur. Instead, we think that it is more in accord with the language of *Connell* to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

that as essential to its decision. *ACCO* was written before *Connell* and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interests" which are emphasized in *National Woodwork*, *Connell*, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

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[36]Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the *Connell* Court stated:

> [W]e think its authorization extends only to agreements in

the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

> the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that *Connell* does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) Practical Consequences.

Our reading of *Connell* to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it is supported by the severe practical limitations attending a

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[37]Our reading of the quoted language in *Connell* as presenting disjunctive alternatives rather than conjunctive and cumulative requirements is supported by the District of Columbia Circuit and probably by the Third Circuit. *Donald Schriver, Inc., supra; Larry V. Muko, Inc. v. Southwestern Pennsylvania Building Construction Trades Council*, 609 F.2d 1368, 1374-75 (3d Cir. 1979)(en banc). Lower courts and commentators have varied in their approach to the underlying issue. See *Landscape Specialties, Inc. v. Laborers' International Union, Local 806*, 477 F. Supp. 17 (C.D. Cal. 1979); *Long v. Floorcraft Carpet Co.*, 82 Labor cases ¶ 10,044 (D. Or. 1977); St. Antoine, *supra*, 62 Va. L. Rev. at 619; Janofsky & Hay, *Connell–Consistent with Past, Indicative of Future*, Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursuing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. If unions are confined to negotiating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of subcontracting agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg. Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted that the appearance of any union worker on the job triggers subcontracting agreements covering the entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are within the proviso of 8(e). First, there are overwhelming practical difficulties in

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[38]The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We belive that it is a more manageable task, however, to police jobsites to ensure that subcontractors working there have agreements with the policing union than it is to determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, the legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining agreements. Third, the *Connell* decision, which admittedly has language that might point to either result, may fairly be read to support the validity of subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true that the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.

Additional Issues.

It is contended by AGC that even if the construction industry proviso authorizes clauses requiring subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the

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[39] *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980). *Compare Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978), *and NLRB v. International Association of Bridge, Structural Ornamental Iron Workers*, 434 U.S. 335, 350-51 (1978), *with NLRB v. International Longshoremen's Association*, 100 S. Ct. 2305 (1980).

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[40] *See International Union of Operating Engineers, Locals 542, 542-A and 542-B, (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), cert. denied, 429 U.S. 1072 (1977); General Counsel Memorandum, note 25, *supra*.

time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union" subcontractor agreement in a decision that was submitted to the House committee considering the 1959 amendments. *Operating Engineers Local Union No. 3 v. NLRB, supra;* 2 House Hearings 803-07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia Circuit in *Donald Shriver, Inc. v. NLRB, supra,* slip op. at 52-5. We also note that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The actual wording of § 8(b)(4)(ii)(A), however, prohibits coercion of any person *"to enter into any agreement which is prohibited by* [§ 8(e)]."[42] The negative

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[41]Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong. Rec. *18128;* II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong. Rec. 17900, II Leg. Hist. 1433. Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, *see* 105 Cong. Rec. 15516, II Leg. Hist. 1552 (statement of Rep. Madden), said that the question was left open for the courts to decide. 105 Cong. Rec. 19772, II Leg. Hist. 1858.

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[42](Emphasis supplied). Section 8(b)(4)(ii)(A) appears *supra* note 4.

implication of this provision is surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the Board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. *Construction Production Maintenance Laborers Union, Local 383 v. NLRB, (Colson Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964). The Board subsequently acquiesced in the courts' view. *Northeastern Indiana Building Construction Council*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuant to the grievance procedure.[43] The Board concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history makes clear Congress's

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[43]*See* note 1, *supra*.

intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. *NLRB v. International Brotherhood of Electrical Workers*, 405 F.2d 159, 163-64 (9th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969). We have also held that such clauses may be enforced by arbitration. *La Mirada Trucking, Inc. v. Teamsters Local Union 166*, 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitration award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agreement to mean what it says. *Operating Engineers, Local No. 701 v. NLRB*, 578 F.2d 841, 842 (9th Cir. 1978); *Donald Schriver, Inc. v. NLRB, supra*, slip op. at 57-58.

VII.
Conclusion.

We find that provisions in a collective bargaining agreement forbidding the signatory employer to subcontract work at a

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[44]"The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the *Sand Door* case *Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. *See also*, 105 Cong. Rec. 17900, II Leg. Hist. 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it . . . ." 105 Cong. Rec. A8359, II Leg. Hist. 1830.

construction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employers to enter such agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently invalid. We accordingly enforce the orders of the Board in their entirety.

Pacific Northwest Chapter of the Associated Builders Contractors, Inc., et al. v. NLRB, et al.—Nos. 78-3469, 78-3487, 78-3619, 78-3468, 79-7011

SNEED, Circuit Judge, (with whom CHOY, ANDERSON and FARRIS, Circuit Judges, concur) dissenting:

As with many legal issues, where one ends up in this case depends upon where one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry proviso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches its conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting point, on the other hand, is with *Connell Construction Co. v. Plumbers Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), and its concern with the "top-down organizing" effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Pacific Northwest Chapter of the Associated Builders Contractors, Inc. v. NLRB*, 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. *Id.* at 1348-50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme Court in *Connell*.

____ F.2d ____ (p. 26 majority opinion). Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, is said not to have been a concern of the Supreme Court in *Connell* because in that case "the union did not purport to represent any of the interests served by the proviso." ____ F.2d ____ (p. 26). Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in *Connell* is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more emphathetic with *Connell's* concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union standards governing wages and working conditions, was more efficient than its competitiors [sic].

It must be acknowledged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644-46 (1967); *see also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Johnson*, *368* F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrimination by employers." ____ F.2d ____ (p. 29). I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legislative history of the proviso. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975). In surveying the legislative history, we concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. *Id.* at 851; *accord, Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C.

Cir. 1966); *Essex County District Council of Carpenters v. NLRB*, 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *International Union of Operating Engineers, Locals 542, 542-A and 542-B*, 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). I see no reason to depart from our earlier analysis of the purpose of the proviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong. Rec. 19785-86, 19809 (1959); II Leg. Hist. 1815-16 (extension of remarks of Senator McNamara and Representative Thompson); *contra* 105 Cong. Rec. 10004-05 (1959); II Leg. Hist. 1861 (extension remarks of Representative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As *Connell & ACCO* concluded, the legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction. *See, e.g.*, I Leg. Hist. 82 (message from President Eisenhower to Congress); 105 Cong. Rec. 15852, II Leg. Hist. 1684 (statement of Congressman Goodell); 105 Cong. Rec. 17333-34, II Leg. Hist. 1383-84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, it too strongly supports the conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong. Rec. 15541 (1959); II Leg. Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those challenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect

broad subcontractor clauses. I believe this reasoning gives far too much weight to the bare reference to the pattern of collective bargaining referred to in the Committee Report. *See Connell, supra*, 421 U.S. at 628-29. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That limitation at least partially overruled the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). *Connell, supra*, 421 U.S. at 632-33. The holding of the panel gets my nod.[1]

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[1]Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it

FARRIS, Circuit Judge, with whom Judge Choy and Judge Anderson join, dissenting:

I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to nonsignatory contractors. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . ." *Id.* The precise issue here is whether that proviso legalizes agreements that limit subcontracting at sites where the employer has no employees represented by the union. The majority holds that it does. I disagree.

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and . . . possibly to common-situs relationships on particular jobsites as well." *Id.* at 633.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a

says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help cause in the AGC contract is invalid.

collective bargaining agreement to restrict an employer's subcontracting at the jobsite where it employs the union's members. The majority asserts that another purpose—maintenance of contract standards in the industry—requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. *See also Donald Shriver, Inc. v. NLRB*, No. 78-1277, slip op. at 43-47 & n. 29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. *See generally* Archibald Cox, Derek Bok & Robert Gorman, *Cases and Materials on Labor Law*, 892-95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

APPENDIX J: ORDER OF SUPREME COURT GRANTING CERTIORARI IN CASE NOS. 80-1798, 80-1808 AND 81-91

In The
Supreme Court of the United States
October term, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

The motion of Air Conditioning and Refrigeration Institute, et al. for leave to file a brief as amici curiae in Nos. 80-1798 and 80-1808 is granted. The motion of The Associated General Contractors of America, Inc. for leave to file a brief as amicus curiae in No. 80-1808 is granted. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

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FILED
JUL 22 1981
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CLERK

Nos. 80-1798 and 80-1808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WOELKE & ROMERO FRAMING, INC.,
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v.

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Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR RESPONDENT UNIONS IN OPPOSITION

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Northern Indiana Bldg. and Const. Trades Council (Centlivre Village Apartments), 148 N.L.R.B. 854 (1964) 4

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§ 10(e) 3

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Respondents.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR RESPONDENT UNIONS IN OPPOSITION

As stated by the petitioner in one of these cases:

> The questions presented in this case are similar and related to those in *Donald Schriver, Inc., et al.* v. *N.L.R.B.*, numbered in this Court as Case No.

80-1257, in which a petition for writ of certiorari has been filed.[1]

On May 4, 1981, this Court denied the Petition for Writ of Certiorari in *Donald Schriver*, *supra*, 49 U.S. L.Wk. 3825.

In the instant case the Ninth Circuit concluded, as had the District of Columbia Circuit in *Donald Schriver*, 635 F.2d 859, that the Labor Board's unanimous interpretation of the construction industry proviso to § 8(e) is correct and that the contract provisions challenged herein are lawful. The present petitions and the briefs *amici* which have been submitted in their support offer nothing that would justify the grant of certiorari here after its denial in *Schriver*.[2] Rather, those on petitioners' side stress that the interpretation of the proviso has consequences which they think are undesirable. Such arguments are, of course, far wide of the mark because the disagreement of one group of partisans with Congress' resolution of an issue of economic policy cannot possibly justify an exercise of this Court's certiorari jurisdiction.

The court below delivered a thorough and well-reasoned opinion, as did the *Schriver* court of appeals.[3] We can-

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[1] Petition for Certiorari in No. 80-1798, p. 1. This statement is reiterated, *id.* at p. 6, n. 4.

[2] See the Brief for Respondent Unions in No. 80-1257, pp. 2-5, which we believe sets forth the heart of the D.C. Circuit's analysis of the pertinent legislative materials.

[3] Because heavy reliance is placed in the petitions on Judge Sneed's dissenting opinion, it is appropriate to emphasize that his dissent acknowledged that "Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases." (Pet. App. in No. 80-1798 at p. 47.) Senator Kennedy was the Chairman of the Senate conferees. Accordingly, the majority below, like the District of Colum-

not improve upon that analysis. Accordingly, and for the reasons stated in the Brief in Opposition of the National Labor Relations Board, with which we are in agreement, we submit that the petitions for certiorari in these cases should be denied.[4]

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bia Circuit, gave significant weight to his explanation of the construction industry proviso:

> *"Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e)."* (*Id.* at p. 18, quoting 105 Cong. Rec. 17900, court's emphasis.)

See, in addition, the D.C. Circuit's opinion in *Donald Schriver*, 635 F.2d at 879. The latter court also quoted the following from the same statement by Senator Kennedy:

> "The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them." (*Id.*)

It may be noted also that the other statements in the legislative history cited by Judge Sneed do not contradict what Senator Kennedy said; they merely give examples of conduct which would be legal under the construction industry proviso without any indication that those examples were intended to be exhaustive. Moreover, Senator Kennedy's statement is entirely consistent with what was decided by this Court in *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616. The Union in that case was engaged in an entirely novel organizing device, and the agreement which was there struck down had no antecedent in the construction industry at the time of the 1959 amendments. By contrast, contracts of the kind challenged in the present case were well known at that time. (See the opinion below, Pet. App. in No. 80-1798, pp. 20-21, and 635 F.2d at 879-880 (D.C. Cir.)).

[4] Petitioners seek to raise one issue which was not before the Court in *Donald Schriver*, namely, whether it is a violation of § 8 (b)(4)(A) for a union to strike to obtain an agreement which is lawful under the construction industry proviso of § 8(e). But the General Counsel, exercising his exclusive statutory authority to determine the scope of unfair labor practice complaints (see §§ 3 (d) and 10(b) of the Act) did not proceed on that theory and

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it was neither litigated before, nor decided by, the Board. And, assuming that the issue is nevertheless open, petitioners did not preserve it for review as required by § 10(e). See, *e.g.*, *Labor Board* v. *Mine Workers*, 355 U.S. 453, 463-464. In any event, the proposition that a strike (or other activity covered by § 8(b)(4)(ii)) is forbidden by § 8(b)(4)(A) if its object is to obtain an agreement which is lawful by virtue of the construction industry proviso to § 8(e) is irreconcilable with the language of § 8(b)(4)(A):

> "forcing or requiring any employer or self-employed person * * * *to enter into any agreement which is prohibited by § 8(e)*." (Emphasis added)

That proposition has therefore been rejected by every Court of Appeals to which it has been presented and, after an initial false start, by the Board. *Essex County and Vicinity Dist. Council of* v. *NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Constr. Prod. & Maintenance Laborers Union, Local 383* v. *NLRB (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9 Cir., 1963). See also *Northern Indiana Bldg. and Const. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964) overruling *Constr. Prod. & Maintenance Laborers Local 383 (Colson & Stevens Constr. Co.)*, 137 N.L.R.B. 1650 (1962).

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether union signatory subcontracting clauses—*i.e.*, contract clauses barring subcontracting except to contractors who are signatories to agreements with particular unions—that are sought or negotiated in the context of a collective-bargaining relationship are privileged by the construction industry proviso to Section 8(e) of the National Labor Relations Act, where they are not limited in application to particular jobsites at which both union and nonunion workers are employed.

2. Whether a union violates Section 8(b)(4)(A) of the Act by picketing to obtain a union signatory subcontracting clause that is lawful under the construction industry proviso to Section 8(e).

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No. 80-1798

WOELKE & ROMERO FRAMING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (W. & R. Pet. App. 1-52) is not yet officially reported.[1] That opinion reviewed two related National Labor Relations Board cases consolidated for hearing and decision in the court of appeals. The decision and order of the Board in *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)* (W. & R. Pet. App. 71-103), a case in which petitioner in No. 80-1798 was a party, are reported at 239 N.L.R.B. 241. The decision and order of the Board in *International Union of Operating*

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[1]The case was heard and decided by an 11-member en banc panel, in accordance with Pub. L. No. 95-486, Section 6, 92 Stat. 1633, and Rule 25 of the Rules of the Ninth Circuit.

Engineers, Local No. 701 (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.) (P. Nw. Pet. App. A-147 to A-182), a case in which petitioner in No. 80-1808 was a party, are reported at 239 N.L.R.B. 274.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981 (W. & R. Pet. App. 1). The petitions for certiorari in both No. 80-1798 and No. 80-1808 were filed on April 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[2]

1. a. From July 5, 1974, to June 15, 1977, petitioner Woelke & Romero Framing, Inc. ("Woelke"), a framing subcontractor in the construction industry in southern California, was party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Carpenters") (W. & R. Pet. App. 4, 76). Shortly before the agreement was to expire, Woelke and Carpenters commenced bargaining for the purpose of negotiating a successor agreement. In August 1977, however, the parties reached an impasse over, *inter alia*, Carpenters' demand for a union signatory subcontracting clause, *i.e.*, a clause that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement." (*Id.* at 4-5, 77-78, 79.)[3] In support of this proposal and its other demands, two

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[2]The facts in both *Woelke & Romero* and *Pacific Northwest* were stipulated by the parties (W. & R. Pet. App. 72; P. Nw. Pet. App. A-149 to A-150).

[3]The clause in question provides (*id.* at 5 n.4, 79):

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building,

Carpenters' locals picketed Woelke's construction sites, causing work stoppages by other employees at certain of the sites (*id.* at 5, 81). Woelke filed unfair labor practice charges with the Board, asserting, *inter alia*, that the proposed restriction on its subcontracting prerogatives violated the proscription in Section 8(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. 158(e), against secondary agreements, and that, therefore, Carpenters' picketing in support of that restriction violated Section 8(b))(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A) (W. & R. Pet. App. 71, 81-82).

b. From June 1, 1975, through May 31, 1980, the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. ("AGC"), an association of approximately two hundred construction industry employers in Oregon and southwest Washington, was party to a collective-bargaining agreement with Local 701 of the International Union of Operating Engineers, AFL-CIO ("Engineers") (P. Nw. Pet. App. A-4 to A-5, A-148, A-152 to A-153, A-155). The agreement contained, *inter alia*, a union signatory subcontracting clause, prohibiting AGC from subcontracting construction jobsite work "to any

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structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

The parties also reached impasse over the Carpenters' demand to include in the bargaining unit Woelke's foremen, who are supervisors within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11) (W. & R. Pet. App. 4 n.3, 77-78). The Board found (*id.* at 98-100) that the Carpenters' picketing in support of this demand violated Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), and the court below agreed (W. & R. Pet. App. 4 n.3). The petitions raise no question with respect to this issue.

person, firm or company who does not have an existing labor agreement with the [Engineers] Union covering such work" (*id.* at A-5, A-155 to A-156).[4] In addition, the agreement authorized Engineers to take "such action as they deem necessary"—including strikes and other economic self-help—to enforce awards or resolutions obtained through the grievance and arbitration process on matters covered by the agreement (*id.* at A-5, A-157 to A-170 to A-172). In April 1977, petitioner Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. ("Pacific Northwest"), filed with the Board unfair labor practice charges asserting, *inter alia*, that the AGC/Engineers contract violated the proscription against secondary agreements contained in Section 8(e) of the Act (P. Nw. Pet. App. A-6, A-147 to A-148, A-159).[5]

2. The Board agreed (W. & R. Pet. App. 84-90; P. Nw. Pet. App. A-161 to A-164) with petitioners' contention that the union signatory subcontracting clauses at issue were secondary in thrust and therefore violative of Section 8(e) of the Act, unless saved by the construction industry proviso to that section. The Board, however, rejected (W. & R. Pet. App. 90-98; *Pacific Northwest*, 239 N.L.R.B. 274, 276-277)[6]

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[4]The clause in question provides (*id.* at A-155 to A-156):

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

[5]AGC was technically a respondent in the Board proceeding (*id.* at A-148), but it supported the position of the General Counsel and Pacific Northwest, the charging party, that the subcontracting provision violated Section 8(e) of the Act (*id.* at A-159). AGC has filed a brief as amicus curiae in support of Pacific Northwest's petition for a writ of certiorari in No. 80-1808.

[6]The appendix to the petition in No. 80-1808 inadvertently omits a portion of the Board's decision.

the argument that this Court's decision in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), requires the conclusion that the clauses, although literally covered by the proviso, are nevertheless excluded from its protection because they are not limited in application to particular jobsites at which both union and nonunion workers are employed. Rather, the Board held (W. & R. Pet. App. 97) that the construction industry proviso, as construed in *Connell*, permits subcontracting clauses like those here, where they are sought or negotiated "in the context of a collective bargaining relationship."[7] Finding that the subcontracting clauses here were in fact sought or negotiated in the context of "collective-bargaining relationship[s],"[8] the Board concluded (W. & R. Pet. App. 98; *Pacific Northwest, supra*, 239 N.L.R.B. at 277) that they were protected by the proviso and therefore lawful under Section 8(e) of the Act.

Accordingly, the Board dismissed (W. & R. Pet. App. 98) Woelke's claim that Carpenters' picketing in support of its subcontracting proposal violated Section 8(b)(4)(A) of the Act. However, the Board (Chairman Fanning dissenting) determined (P. Nw. Pet. App. A-165 to A-175) that the subcontracting clause at issue in *Pacific Northwest* lost the protection of the construction industry proviso—and hence

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[7]The Board added (*id.* at 97-98) that, under *Connell*, such clauses are privileged "possibly even without * * * [a collective-bargaining] relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem[.]" *i.e.*, the friction created by having union and nonunion employees working together on the same jobsite. See *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

[8]The Board noted (W. & R. Pet. App. 92) that "General Counsel and Woelke concede that [Carpenters] and Woelke have a lawful collective-bargaining relationship and, therefore, do not contend that any collective-bargaining relationship requirement of *Connell* is wanting." Similarly, AGC and Engineers have had a collective-bargaining relationship at least since June 1, 1975 (page 3, *supra*).

violated Section 8(e)—because of the provision in the AGC/Engineers contract permitting the union to resort to economic action if signatory employers failed to comply with grievance arbitration decisions on any matter covered by the contract, including the subcontracting restriction.[9] Therefore, the Board ordered (P. Nw. Pet. App. A-177 to A-180) AGC and Engineers to cease and desist from maintaining the unlawful provision and to post appropriate notices.[10]

3. An 11-member en banc panel of the court of appeals (page 1, note 1, *supra*), by a 7-4 vote, upheld the Board's conclusion that union signatory subcontracting clauses like those at issue here are privileged by the construction industry proviso to Section 8(e) where they are "arrived at in the context of collective bargaining relationships" (W. & R. Pet. App. 38). Rejecting petitioners' contention that such clauses are violative of Section 8(e) unless restricted in application to particular jobsites and particular times at which the contracting employers have union members present, the court found (W. & R. Pet. App. 26-37) that the legitimate purpose of subcontracting clauses was not only to avoid jobsite "friction" between union and nonunion workers, but also to protect contract standards that might

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[9]A subcontracting agreement loses the protection of the construction industry proviso if it contains terms that sanction strikes or other self-help measures in the event subcontracting in violation of the agreement occurs, because carrying out such measures would violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *Bricklayers & Stone Masons Union, Local No. 2* v. *NLRB*, 562 F. 2d 775, 787-788 (D.C. Cir. 1977).

[10]The court below enforced (*id.* at A-66 to A-70) the Board's order in this respect, and the petitions raise no question with respect to that issue here.

otherwise be jeopardized because of the unique and transitory nature of the employment relationship in the construction industry.[11]

ARGUMENT

1. The holding of the en banc panel of the court of appeals in this case—that the construction industry proviso to Section 8(e) of the National Labor Relations Act privileges union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship even though they are not restricted in application to particular jobsites and particular times at which the contracting parties have union members present—is in accord with that of the District of Columbia Circuit in *Donald Schriver, Inc.* v. *NLRB*, 635 F. 2d 859 (1980), cert. denied, No. 80-1257 (May 4, 1981). The same considerations that warranted denial of the petition for certiorari in *Schriver* call for denial of the present petitions.

As shown in the Board's Brief in Opposition in *Schriver* (pages 18-20),[12] the language of the construction industry proviso to Section 8(e) contains no limitation such as that suggested by petitioners, but, instead, broadly authorizes agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of construction." Moreover, the 1959 Congress, which enacted the construction industry proviso and other relevant amendments to the Act, intended to preserve the pattern of collective bargaining in the construction industry as it existed prior to 1959; and agreements such as those involved here were part of that pattern (see also W. & R. Pet. App. 17-21).

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[11]The dissenting judges (W. & R. Pet. App. 44-52) adhered to the view of the original three-judge panel (609 F. 2d 1341 (1979)) that the purpose of the proviso was only to avoid jobsite "friction" between union and nonunion workers.

[12]A copy of that brief has been served upon counsel for the parties in the present cases.

Petitioners' contention that subcontracting clauses nevertheless enjoy proviso protection only when they are limited to particular jobsites and particular times at which union members are present—a position adopted by the dissenting judges below—is based on the premise that the proviso authorizes only those clauses narrowly tailored to avoid the *Denver Building Trades* problem (see page 5, note 7, *supra*), that is, the "friction" that may arise when union and nonunion workers work "shoulder-to-shoulder." (See W. & R. Pet. App. 22, 47-49). As the court below recognized (*id.* at 26-27), however, the union members' interest in their employer's subcontracting practices goes well beyond this narrow concern:

> [T]he outstanding peculiarity of the construction industry is that the work force of any given employer—contractor or subcontractor—is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. * * * The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but [also] of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

Accordingly, the workers have a substantial interest in assuring that their collective-bargaining agreement is respected by their employer, wherever he works, and "whether he does the work himself or subcontracts it out." *Donald Schriver, Inc.* v. *NLRB, supra*, 635 F. 2d at 881.

Moreover, as the court below correctly noted (W. & R. Pet. App. 37), limiting subcontracting agreements to sites and times where "shoulder-to-shoulder conflict" may arise would create "immense practical problems." Jobsite-by-jobsite negotiation of collective-bargaining contracts would be "burdensome to the point of impossibility" and would "run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence" (*id.* at 38; citation omitted). Nor would the burden be lessened appreciably by the suggestion of the dissenting judges below (*id.* at 49) that subcontracting agreements could be negotiated wholesale and triggered only when union workers appear on the job. Unions would still be forced to police every jobsite of their contracting employers in order to "determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction" (*id.* at 38 n.38).[13]

Contrary to petitioners' contention (W. & R. Pet. 11-17; P. Nw. Pet. 18-23), the conclusion that the construction industry proviso to Section 8(e) privileges subcontracting agreements that are not limited to avoiding jobsite friction resulting from union and nonunion members working side-by-side is not inconsistent with this Court's decision in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). There, the Court, in order to insure that secondary subcontracting clauses could

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[13]Contrary to the suggestion of the Associated General Contractors of America, Inc., as amicus curiae (AGC Br. 3-4), agreements such as those at issue here have long been in use in the construction industry (W. & R. Pet. App. 20-21) and have been upheld consistently and repeatedly by the Board and the courts of appeals (*id.* at 19-20, 23 n.25). Accordingly, there is no basis for AGC's assertion (AGC Br. 2-8) that the decision below will create "[s]ubstantial dislocations in the construction industry" and suddenly give rise to a flood of antitrust litigation.

not be used as an unlimited means for "top-down" organizing, construed the construction industry proviso exemption as applicable "only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well" (421 U.S. at 633). The plain meaning of this language is that "the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem" (W. & R. Pet. App. 97-98).

Moreover, the evil that the Court sought to avoid in *Connell* is not present where subcontracting clauses are sought or negotiated in the context of a collective-bargaining relationship. As the court below explained (W. & R. Pet. App. 35-36):

> Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. * * *
>
> The situation is quite different when a union seeks a subcontractor clause in the context of a collective-bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts

to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. * * *

2. Petitioners seek (W. & R. Pet. i, 21-25; P. Nw. Pet. 2-3) to raise a second issue as well: whether, even if the subcontracting clauses here were valid under the construction industry proviso to Section 8(e), Section 8(b)(4)(A) of the Act would prohibit picketing to secure such lawful subcontracting clauses. However, that issue, which is presented only on the facts of *Woelke & Romero,*[14] was not raised before the Board, either by the General Counsel or by Woelke, the charging party in that case (W. & R. Pet. App. 81-82).[15] Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes consideration of it on review. See, *e.g., Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979). The issue was, however, raised by Woelke in the court of appeals and considered and rejected by the court (W. & R. Pet. App. 7, 40-41). We therefore address it.

The conclusion of the court below that picketing to secure a subcontracting clause valid under the construction industry proviso to Section 8(e) is not violative of Section 8(b)(4)(A) is correct and is in accord with the view of every other court of appeals which has considered that question.[16] Review of the question by this Court is therefore unwarranted.

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[14]There is no claim that the Engineers in *Pacific Northwest* picketed to *secure* the subcontracting clause contained in their collective-bargaining agreement with AGC.

[15]In their briefs to the Board, the General Counsel (Br. 11-19) and Woelke (Br. 12-14 & n.12) simply argued that the scope of the subcontracting clause at issue rendered it unlawful under Section 8(e) and that, for that reason alone, Carpenters' picketing violated Section 8(b)(4)(A) of the Act.

[16]*Essex County and Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F. 2d 636 (3d Cir. 1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F. 2d 534 (D.C. Cir. 1964); *Bldg. and Constr. Trades*

The express terms of Section 8(b)(4)(A) prohibit coercing any person "to enter into any agreement which is prohibited by section 8(e)." As the court below observed (W. & R. Pet. App. 40-41), the negative implication of this language is that it is lawful to picket to secure an agreement which, by virtue of the construction industry proviso, is *not* "prohibited by [S]ection 8(e)." And because the broad language of the construction industry proviso itself in no way limits its protections to agreements "voluntarily" achieved, there is simply no basis in the language of the Act for petitioners' contention respecting picketing to secure subcontracting clauses.

In an effort to avoid the effect of the "plain words" (W. & R. Pet. App. 41) of the statute, petitioner Woelke (W. & R. Pet. 21-22, 24) and the United States Chamber of Commerce as amicus curiae (Chamber Br. 4, 9-12) rely on the legislative history of Section 8(e). They contend that Congress, in enacting Sections 8(e) and 8(b)(4)(A) in 1959, intended merely to "tak[e] a photograph of the law [of secondary boycotts] as it then existed, [and] simply preserved to labor organizations in the construction industry the same rights which they enjoyed under *Sand Door* [*Local 1976, Carpenters' Union* v. *NLRB*, 357 U.S. 93 (1958)] and prior court and Board decisions preceding the enactment of Section 8(e)" (Chamber Br. 10-11). See, *e.g.*, 105 Cong. Rec.

Council v. *NLRB*, 328 F. 2d 540 (D.C. Cir. 1964); *Constr. Prod. & Maintenance Laborers Union, Local 383* v. *NLRB (Colson & Stevens Constr. Co.)*, 323 F. 2d 422 (9th Cir. 1963). After Congress added Sections 8(e) and 8(b)(4)(A) to the Act in 1959, the Board briefly adopted the contrary view, see *Constr., Prod. & Maintenance Laborers Local 383 (Colson & Stevens Constr. Co.)*, 137 N.L.R.B. 1650 (1962), enforcement denied in relevant part, 323 F. 2d 422 (9th Cir. 1963). However, it abandoned the *Colson & Stevens* rule two years later, after the rule had been uniformly rejected by the courts of appeals. See *Northeastern Indiana Bldg. and Constr. Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964).

17900 (1959) (remarks of Sen. Kennedy). However, under the then existing law, strike pressure to obtain an agreement that would prohibit subcontracting to unspecified nonunion firms *in futuro* had not been held unlawful.

Thus, prior to the 1959 amendments, it was not unlawful for an employer and a union voluntarily to enter into an agreement whereby the employer agreed not to do business with nonunion firms, but it was a violation of Section 8(b)(4)(A) of the 1947 Act, 29 U.S.C. (1958 ed.) 158(b)(4)(A) (which is similar to Section 8(b)(4)(B) of the present Act), for a union to use strike pressure to force an employer who had breached the agreement to terminate its ongoing business relations with a particular nonunion firm.[17] There remained, however, a separate question: whether it was a violation of Section 8(b)(4)(A) for a union to strike or picket an employer for an agreement to boycott nonunion firms in advance of the employer's having established business relations with any particular firm. This question was not resolved prior to the 1959 amendments.[18]

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[17]See *Local 1976, Carpenters' Union* v. *NLRB (Sand Door), supra; NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951).

[18]The cases cited by Woelke (W. & R. Pet. 24) and the Chamber (Br. 9-10) are not to the contrary. In *Local 47, Teamsters Union (Texas Industries, Inc.)*, 112 N.L.R.B. 923 (1955), enforced, 234 F. 2d 296 (5th Cir. 1956), the Board, although finding that the union violated Section 8(b)(4)(A) by picketing the general contractors (Bateson and McCann) for a contract clause that required subcontractors to abide by the union agreement, found that the clause was aimed at two particular subcontractors whom the general contractors had engaged (112 N.L.R.B. at 924). The Board added: "Whether the Union's picketing also violated 8(b)(4)(A) insofar as it sought to regulate future dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the Union's wage standards, is a question which we need not and do not decide" (*id.* at 925 n.2). Similarly, in *Bangor Bldg. Trades Council*, 123 N.L.R.B. 484 (1959), enforced, 278 F. 2d 287 (1st Cir. 1960), which involved picketing to enforce a subcontracting agreement which the general contractor had breached by engaging a nonunion subcontractor, the picketing was aimed at terminating business

In the 1959 amendments, Congress resolved this question by adding a new Section 8(b)(4)(A) provision (the former provision was retained, in amended form, as Section 8(b)(4)(B)), which, as noted above, makes it an unfair labor practice for a union to force or require an employer "to enter into any agreement which is prohibited by section 8(e)." Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, Section 704(a), 73 Stat. 542-543. The Board's conclusion that the new Section 8(b)(4)(A) does not proscribe economic pressure to obtain subcontracting agreements that are authorized by the construction industry proviso to Section 8(e), but that Section 8(b)(4)(B) prohibits economic pressure to enforce such agreements by disrupting the offending contractor's ongoing business relations with particular third parties (see page 6, note 9, *supra*) is therefore consistent with Congress' intention (page 12, *supra*) to leave labor organizations in the construction industry with the same rights that they enjoyed prior to the 1959 amendments.

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relations with a particular person (123 N.L.R.B. at 488-489). And, in *Bricklayers Union (Selby-Battersby & Co.)*, 125 N.L.R.B. 1179 (1959), the Board found that the immediate object of the union's strike in support of its demand for a clause that essentially barred subcontracting to nonunion firms was to force Selby to cease doing business with particular employers—"a well-defined, identifiable group" of firms with which "Selby had been enjoying a regular and continuing business relationship" (*id.* at 1182).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN SUPPORT OF

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION OF THE AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, INC., AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC.

FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Air Conditioning & Refrigeration Institute, the Air Movement and Control Association, Inc., the American Consulting Engineers Council, the Architectural Woodwork Institute, the National Society of Professional Engineers, and the National Woodwork Manufacturers Association, Inc., move this Court for leave to file the accompanying brief as amicus curiae supporting the petitioners, Woelke & Romero Framing, Inc., and the Pacific Northwest Chapter of the Associated Builders & Contractors. In support of this motion, the above-named amici show as follows:

1. The associations joining herein have a substantial and longstanding interest in the effective implementation of the statutory prohibitions against secondary boycotts, particularly in the construction industry. Members of the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers (NSPE) design, specify and provide engineering services on all types of construction projects and therefore have a major role in determining the material, components and methods to be used in construction. Members of the Air Movement and Control Association (AMCA), the Air Conditioning & Refrigeration Institute (ARI), the Architectural Woodwork Institute (AWI), and the National Woodwork Manufacturers Association (NWMA), manufacture materials and components used in construction throughout the United States. Together, these associations represent a substantial segment of the construction industry.

2. The amici joining herein have wide experience with the problems in the construction industry resulting from secondary boycotts effectuated through diverse union conduct. As construction industry designers, engineers and manufacturers, the amici are affected directly and substantially by labor and work rule restrictions that reduce the latitude of construction contractors to select the most appropriate methods, materials and components. Accordingly, they have participated individually, jointly and with other industry associations in many cases before the National Labor Relations Board ("NLRB" or "the Board") and the courts in which the interpretation and application of the secondary boycott provisions of the National Labor Relations Act were in issue.*

3. The issues presented for the Court's consideration by the petitions for a writ of certiorari in these cases are of crucial importance to the amici. Of particular concern is the use of union subcontracting agreements to effectuate product boycotts unrelated to the legitimate interests of unions in setting wage rates and working conditions. The amici believe that under the Ninth Circuit's ruling, project owners, architects and engineers will often be left without the option of utilizing prefabricated or factory-assembled components which unions refuse to install, since the general contractors may be barred from dealing with all non-union subcontractors who are free to install such components.

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* *NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507 (1977); *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

4. The written consents of the Solicitor General and counsel for the petitioners to the filing of this brief have been filed with the Clerk of the Court. Counsel for the Unions in No. 80-1808 has indicated that his client is unwilling to grant consent and his letter also has been filed with the Clerk of the Court. Counsel for the Union in No. 80-1798 has not responded to the request for consent.

WHEREFORE, it is respectfully moved that the amici joining herein be granted leave to file the accompanying brief amicus curiae in these cases.

Respectfully submitted,

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May 29, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1798

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *Respondents.*

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, INC., AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC.

IN SUPPORT OF

PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This brief amicus curiae on behalf of the above-named organizations is submitted contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The interest of the amici joining herein in the issues presented for the Court's review in these cases is detailed in the accompanying motion. (*Supra*, pp. 1-4).

STATEMENT OF THE CASE

The petitions for certiorari concern two separate cases of secondary conduct which were consolidated at both the Board [1] and appellate levels. Case No. 80-1798 concerns a proposed collective bargaining agreement which two Carpenter's Union locals sought to negotiate with the employer after the then-current agreement lapsed. One of the clauses would have forbidden the company to subcontract jobsite work except to firms having a current agreement with the Carpenters. Following an impasse in bargaining, the unions picketed the employer, and workers employed by other subcontractors stopped work on some of the projects. The NLRB held that the construction industry proviso to Section 8(e) of the Labor Act protected the proposed clause and that the picketing designed to secure acceptance of the clause was lawful.

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[1] These two cases, along with several other cases, were initially consolidated for oral argument by the NLRB in 1978. Among the cases was *Donald Schriver, et al. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3822 (U.S. May 5, 1981).

Case No. 80-1808 emanates from a collective bargaining agreement negotiated by an Engineers Union local and a chapter of the Associated General Contractors (AGC). The agreement precluded AGC employers from assigning work to any subcontractor not having a current agreement with the union. A chapter of the Associated Builders and Contractors (A.B. & C.) charged that the subcontracting restriction violated Section 8(e) of the Labor Act. The NLRB upheld the legality of the clause but struck down a self-enforcement provision which allowed the union to strike or picket to enforce the subcontractor clause.

A three-judge panel of the Ninth Circuit subsequently reversed the Board in material part and sustained the employers' petitions for review. 609 F.2d 1341 (9th Cir. 1979). Thereafter, the Court of Appeals granted petitions for rehearing *en banc* and ordered the matters reheard before a limited *en banc* panel as provided by statute and local rule. On April 17, 1981, the Ninth Circuit issued its opinion and judgment affirming the decisions and orders of the Board.

REASONS FOR GRANTING THE WRIT

THESE PETITIONS PRESENT THE LAST CHANCE FOR THIS OR ANY COURT TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF SECTION 8(e) WHICH THIS COURT LEFT UNANSWERED IN THE *CONNELL* CASE

The petitions for certiorari in these cases present the last remaining opportunity for judicial review of a difficult set of legal questions concerning the applicability of Section 8(e) of the National Labor

Relations Act to restrictive subcontracting agreements in the construction industry. The importance of these questions, not only to employers and unions within the industry, but also to their customers and suppliers and ultimately to the economy of our nation, can scarcely be overstated.

When the Labor Board first confronted these issues, it scheduled an unprecedented six hours of oral argument in recognition of both their complexity and their great importance.[2] Since the Board announced its decisions in these cases, rejecting in large part the position of its own General Counsel,[3] only two courts have had occasion to review the Board's resolution of the issues involved. A three-judge panel of the District of Columbia Circuit upheld the Board's position in *Donald Shriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980). In the cases at bar, as noted above, a three-judge panel of the Ninth Circuit initially rejected the Board's position. Later, upon rehearing, a seven-judge majority of a limited *en banc* panel of the Ninth Circuit reversed the earlier panel decision and upheld the Board's decisions over vigorous dissents by the remaining four

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[2] The court of appeals below also expressly acknowledged the importance of these issues in the first sentence of its opinion. A.B. & C. Pet. A-3.

[3] The NLRB General Counsel's carefully considered opinion on these legal issues is set forth at length in Memorandum 76-57, issued from his office on December 15, 1976, and published at 93 LLR 390. At the outset of that memorandum, the General Counsel notes that the issues discussed "are exceedingly difficult and the answers to them are likely to have a substantial impact on construction industry employers and unions." 93 LLR at 391.

judges who participated. Even the judges of the majority acknowledged that their view of the scope of Section 8(e) is "not free from doubt." A.B. & C. Pet. A-28.

Unless this Court grants review in these cases, that doubt can never be resolved. No other court will ever have an opportunity to address the issues presented here, because the position taken by the Labor Board in these cases precludes its General Counsel from issuing any more complaints alleging that subcontracting restrictions of the kind involved herein violate Section 8(e) of the Act.[4] And, because the General Counsel's authority to issue complaints is exclusive and essentially unreviewable under the Act, no such case can reach even the Board, let alone any court, without issuance of a complaint by the General Counsel. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975).

Consequently, the decision appealed from in these cases has significance extending beyond the boundaries of any judicial circuit. If this Court denies review, building trade unions throughout the country will henceforth be free to force any construction contractor with whom they have any sort of collective bargaining relationship to agree never to engage any non-union subcontractor—or, indeed, any subcontractor who is not signatory to an agreement with a *particular* union—to work on any construction site, regardless of whether the contractor has employees of his own working there. Thus, denial of these peti-

[4] Indeed, the General Counsel stopped issuing such complaints immediately after the Board's decisions herein issued in November 1978.

tions would render purely academic the much-debated question whether this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975), requires more than the bare existence of some collective bargaining relationship between the union and the signatory contractor in order to legitimize such broad secondary boycott agreements under the construction industry proviso to Section 8(e). Indeed, this Court would be effectively foreclosed from ever addressing the important questions regarding the scope of Section 8(e) which it did not fully resolve in *Connell*.

The associations joining in this *amicus curiae* brief strongly believe that the questions presented by these petitions are too important, and the reasoning in support of the decisions below too tenuous, to be allowed to escape forever from further judicial review. The court of appeals' holding that Section 8(e) permits unions in the construction industry to force any contractor with whom they have any sort of bargaining relationship to agree to boycott all subcontractors whose employees have chosen the "wrong" union or no union, if allowed to stand, will seriously endanger not only employee freedom of choice in the construction industry, but also the survival of competition based upon efficiency of operation and technology. Moreover, it will do so in a way that cannot be justified on the basis of legitimate union concerns.

Restrictive subcontracting agreements of the sort involved in these cases are, by their very nature, secondary and anticompetitive devices. Their whole purpose is to exclude non-union subcontractors from a portion of the competitive construction market. But

their ultimate effect on efficiency and productivity in the industry involves much more than just the elimination of *subcontractors* from the competition. For in the process, they also effectively eliminate many efficient *methods* and innovative *products* from use in construction. By strengthening the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, such agreements aggravate the inflationary environment that particularly plagues this industry, to the detriment of the national economy.

The members of the associations joining in this brief know from long experience that the anticompetitive impact of broad subcontracting restrictions, like the ones involved in these cases, inevitably extends far beyond competition based on wages and working conditions. For a construction contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union-approved wage rates and working conditions, but also, almost invariably, to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where it is engaged. When applied during the course of a construction project, these restrictions impose severe limitations on the ability of the project owners, designers and general contractors to utilize the methods they deem most desirable for the particular job.

This Court observed in *Connell Construction Company, Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616, 624 (1975), that the union-employer agreements in issue in that case "indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were

not derived from substandard wages and working conditions but rather from more efficient operating methods." The same is unquestionably true of the agreements at issue in the present cases. They differentiate between subcontractors solely on the basis of whether they have signed contracts with the "proper" union, not on the basis of the wages and employment terms the subcontractors provide to their employees.

Connell teaches that a proper accommodation of federal labor and antitrust policies requires that the construction industry proviso be given limited scope. It protects jobsite subcontracting restrictions only to the extent that they relate to legitimate union interests growing out of circumstances unique to the construction industry. This Court did not undertake to define in *Connell* precisely what union interests qualify for this protection, but the focus of the Court's discussion was upon the concerns expressed in Congressional debates preceding Section 8(e)'s enactment about "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. NLRB*, 361 F.2d 547, 557 (D.C. Cir. 1966). Thus, it is clear that subcontracting restrictions which go no farther than is necessary to prevent such possible jobsite friction—*i.e.*, collectively bargained agreements which do no more than bar the signatory contractor from engaging non-union firms to work on jobsites where his unionized employees are currently working—are protected by the proviso even though they entail some restraint on competition and efficiency. The question not fully resolved by *Connell*, but squarely presented

by the instant petitions, is whether subcontracting restrictions which are not so limited in application may also be within the proviso's scope.

The NLRB General Counsel's office, after carefully analyzing various types of subcontracting restrictions in light of the *Connell* decision, answered this question in the negative. The General Counsel concluded that clauses extending to jobsites where the signatory contractor does not use any employees of his own, or to phases of construction when the signatory's employees would not be present, are "broader than required by the union's legitimate interests" and, therefore, "are not within the scope of the proviso." Office of the General Counsel Memorandum 76-57, 93 LLR 390, 393 (1976).[5]

The four dissenting judges in the court below substantially agreed with this analysis. They pointed out that the problem of preventing jobsite friction, which they viewed as "the dominant motive of Congress in adopting the proviso," is dealt with effectively by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. A.B. & C. Pet. A-101 (Sneed, J., dissenting). While they acknowledged that even such limited agreements would have some "top-down" organizing effects, they emphasized that such agreements at least would not require the signatory employer to "sacrific[e] *all* right to choose the most efficient subcontractor." *Id.* at A-100 (emphasis added).

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[5] The General Counsel's office was, of course, required to abandon this interpretation of the proviso when the Board issued its contrary holding in these cases.

The majority in the court below acknowledged that the legislative history supporting their broader interpretation of the construction industry proviso is not particularly compelling. A.B. & C. Pet. A-28. They also conceded that "the language in the *Connell* opinion dealing with congressional antagonism to 'top-down organizing' may well lean in a direction contrary to our views" *id.* at A-54, and that the *Connell* Court's summary of the proviso's effect "might be susceptible to another reading." *Id.* at A-58. Further, the majority observed that even the position of the Labor Board on these issues "has not been an unwavering one." *Id.* at A-62.

Given the enormous practical and economic consequences of the legal questions at stake here, their answers should not be left to rest forever on such infirm foundations. Given the repeated expressions of doubt by the majority below about the correctness of their reading of *Connell* and the legislative history of the construction industry proviso, their decision should not be left to stand as the last judicial word on the subject. Given the weight of support for the alternative interpretation of the proviso advocated in the General Counsel's 1976 memorandum and adopted by the dissenters below, which would accommodate not only the interest of building trade unions in preserving jobsite peace, but also the important public interest favoring competition based on efficiency in construction, the question of which interpretation is correct deserves further judicial review. And since these petitions present the last opportunity for any court to provide such review, they should be granted.

CONCLUSION

For the reasons set forth above, and those stated in the petitions heretofore filed by Woelke and Romero Framing, Inc., and Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., the *amici curiae* respectfully urge the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1980

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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NO. 80-1798

IN THE

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OCTOBER TERM, 1980

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NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

Interest of *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 2,600 state and local Chambers of Commerce, 1,200 trade and professional associations, and a direct business membership in excess of 75,600. It is the largest association of business and professional organizations in the United

States. The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented by the instant case are of vital concern to the Chamber and its members. The Chamber participated in the litigation of this case before the National Labor Relations Board and the United States Court of Appeals for the Ninth Circuit as an amicus.

One of the questions squarely presented by the facts of this case is whether a labor organization may lawfully picket or strike to obtain a subcontracting clause, even where such clause may be lawful pursuant to the construction industry proviso to Section 8(e) of the National Labor

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[1] E.g., *Carbon Fuel Co.* v. *Mine Workers, UMW*, 444 U.S. 212 (1979); *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979); *N.L.R.B.* v. *Enterprise Association, etc.*, 429 U.S. 507 (1977); *Buffalo Forge* v. *Steelworkers*, 428 U.S. 397 (1976); *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Market* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 490 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971).

Relations Act, 29 U.S.C. §158(e). Or, as stated by petitioner in its "Questions Presented":

> "3. Does Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in 'top down' organizing by striking or picketing to force a contractor to execute an agreement containing a union signatory contractor clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?"

This question must be answered before consideration of the other questions presented.

The Chamber regards this issue as the most significant in the §8(e) area. Moreover, it has not been passed upon by this Court since Congress enacted the 1959 amendments, despite the fact that the current law, as enforced by the NLRB and circuits, overturns *Sand Door*.[2] Therefore, this brief will focus upon that question, and that question alone.

Clearly, the Chamber, whose members are buyers of construction and who must ultimately bear the costs arising from such restrictive and anti-competitive provisions, has a continuing and vital interest in the outcome of this litigation.

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[2] *Carpenters Local 1976* v. *N.L.R.B. (Sand Door)*, 357 U.S. 93 (1958).

Summary of Argument

Amicus, in support of the petitioner, urges that certiorari be granted on each of the various questions posed by petitioner. However, the threshold question to be decided is whether an agreement which is otherwise protected by the construction industry proviso to Section 8(e) of the Act may lawfully be sought by coercive activity. In response to this question, petitioner and amicus maintain that the construction industry proviso to Section 8(e) permits only *voluntary* agreements entered into within the context of a collective bargaining relationship.

The principles enunciated by this Court in *Denver Building Trades,*[3] *Sand Door,* and other pre-1959 authorities were not disturbed by the 1959 amendments. Therefore, construction industry unions gained no greater rights by the enactment of Section 8(e) than they enjoyed prior thereto. What was unlawful then (coercion to obtain an 8(e) agreement) is unlawful now. As such conduct is outside the protection of the construction industry proviso, it violates the secondary boycott provisions of the Act.

The National Labor Relations Board continued to follow these principles in a long line of cases after the 1959 amendments, beginning with its decision in *Construction, Production & Maintenance Laborers Local 1383 (Colson & Stevens),* 137 NLRB 1650 (1962). However, following the lead of some circuit courts, in 1964 the Board reversed its long-standing position. *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments),* 158 NLRB 854 (1964). That decision spawned and opened the floodgates to "top down" organizing efforts con-

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[3] *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951).

demned by this Court in *Connell.* As noted in *Connell,* the facts of that case did not warrant the Court's examination of this most important and seminal issue because the conduct in which the union engaged did not take place within the context of a collective bargaining relationship. Here, that issue is clearly presented, and perhaps for the last time. Accordingly, amicus considers the granting of this petition to be of the utmost importance to the construction industry and the vast numbers of construction purchasers whose interests are advanced by the Chamber.

ARGUMENT

Certiorari should be granted in this case to resolve the question whether a construction industry labor organization may picket or strike to obtain a "hot cargo" subcontractor agreement, or whether Section 8(e) permits only agreements entered into voluntarily by the parties.[4]

In *Connell,* the Supreme Court acknowledged Connell's contention that the construction industry proviso authorizes *only voluntary agreements.* However, because the Court found the agreement outside the protection of the Section 8(e) provisio, as it did not arise within the context of a collective bargaining relationship, the Court found it unnecessary to consider this contention, leaving the issue for resolution in another setting. *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616,

[4] Amicus adopts and supports the brief of petitioner with regard to other asserted grounds for the granting of certiorari in this case.

634, n. 14.[5] This very issue of law now is squarely presented by the facts of this case, and may represent the last opportunity the Court will have to rule upon this critical question.

Subsequent to the 1959 amendments, *a unanimous five-member Board* in *Construction, Production and Maintenane Laborers Local 1383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part 323 F.2d 422 (9th Cir. 1963), held that it was unlawful to strike to obtain a subcontracting clause, even where such clause, if voluntarily entered, would be protected by the construction industry proviso. The Board followed that ruling in a long line of cases, including:

Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952 (1964).

Local 300, Hod Carriers Union (Fiesta Pools, Inc.), 145 NLRB 911 (1964).

Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279 (1963).

Southern Calif. District of Laborers (Swimming Pool Gunnite Contractors), 144 NLRB 978 (1963).

Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49 (1963).

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[5] The Court said: "Connell also has argued that the subcontracting agreement was subject to antitrust sanctions because the construction-industry proviso authorizes only voluntary agreements. The foundation of this argument is a contention that §8(b)(4)(B) forbids picketing to secure an otherwise lawful 'hot cargo' agreement in the construction industry. Because we hold that the agreement in this case is outside the §8(e) proviso, it is unnecessary to consider this alternative contention." (421 U.S. 616, n. 14)

Essex County and Vicinity District Council of Carpenters, 141 NLRB 858 (1963).

Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249 (1963).

Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175 (1963).

Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946 (1963).

Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458 (1963).

Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236 (1962).

Local 60, United Association of the Plumbing & Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282 (1962).

Because some circuits rejected that view, in *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964), the Board reversed its position.[6] Unfortunately, at the time these circuit court cases were decided, the charging party

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[6] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Essex County & Vicinity District Council of Carpenters & Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.*, 328 F.2d 534 (D.C.Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al. (Gordon Fields)*, 328 F.2d 540 (D.C.Cir. 1964). See also, *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

in a labor board proceeding was not considered a party for the purposes of review in the circuit courts, but merely an amicus curiae. Thus, if the Board chose not to seek certiorari, there was nothing the charging party could do on its own initiative. Not until the decision of this Court in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), was that situation corrected and the charging party granted standing to intervene in courts of appeal proceedings for the review or enforcement of labor board orders; and having intervened, to enjoy the status of a party with the right to seek certiorari independent of the Board.

Obviously, after *Centlivre* (decided one year before *Scofield*), the General Counsel declined to issue any further complaints alleging a violation of Section 8(b)(4)(A) where a union sought to compel the execution of an 8(e) agreement. Thus, the issue was smothered and could not be raised before this Court until *Connell* and the litigation created by *Connell*, such as the instant case. Perforce, this Court has never had, and it may never again have, the opportunity to rule upon this critical question.

By permitting building trade unions to extract subcontracting agreements by coercive means, the Board and the circuit courts have overruled *Sand Door* and permitted massive unchecked secondary activity that runs counter to all the concerns and principles that are the underpinnings to *Denver Building Trades, General Electric,*[7] *National Woodwork,*[8] and *Enterprise.*[9] This state

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[7] *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO,* v. *N.L.R.B.*, 366 U.S. 667 (1961).

[8] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[9] *N.L.R.B.* v. *Enterprise Association, etc.*, 429 U.S. 507 (1977).

of the law has unleashed the problems which gave birth to *Connell* and its progeny. It cannot be over-emphasized that the five-member Board that unanimously decided *Colson & Stevens* (the so-called "Kennedy Board") is the very same Board that in less than one year departed from precedent favorable to management in thirteen cases, in some instances recalling decisions for reconsideration and ultimate reversal.[10] *Nevertheless, that same Board was of one mind in holding that only those "hot cargo" agreements which are the product of voluntary action are lawful under §8(e).*

The instant case poses the underlying question left unanswered by *Connell.* In the "hot cargo" and construction industry secondary boycott area of labor law, it is the most significant issue to come before this Court since the enactment of Section 8(e) and the construction industry proviso.

Prior to the 1959 amendments and the enactment of Section 8(e), it was well established that a union could not strike to obtain a hot cargo clause without violating the secondary boycott provisions of the Act. *Texas Industries, Inc.,* 112 NLRB 923, enf'd 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council,* 123 NLRB 484, enf'd 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons & Plasters International Union (Selby-Batters-*

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[10] See address by then Board member and former Chairman, Boyd Leedom, before the Labor Law Section of the Illinois State Bar Association, January 19, 1962, and cases cited therein. (49 LRRM 84, 85) Member Leedom stated:

> "I have made an informal statistical survey of the decisions issued since April 14, 1961, the day that President Kennedy made his latest appointment to the Board. According to my figures, there has been departure from precedent in thirteen cases."

by & Co.), 125 NLRB 1179. This Court's decision in *Sand Door* remains the cornerstone of that principle. In that case, Justice Frankfurter, speaking for the Court, stated that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily*, and thus to engage in a boycott so long as the union refrains from coercive activity in its enforcement.[11] In dissent, Justice Douglas, joined by Chief Justice Warren and Justice Black, reasoned that if the clause was the product of *voluntary collective bargaining*, it should be enforceable, just as any other provision of a collective bargaining agreement. Accordingly, before 1959, "hot cargo" agreements could only be obtained *voluntarily and in an atmosphere free from coercion.*

Section 8(e) outlawed all "hot cargo" argreements *even if voluntary in nature*, with two exceptions—the first, a sweeping exemption for the garment industry, exempting that industry from the prohibitions of both Section 8(e) and Section 8(b)(4); the second, a more limited exception for the construction industry, permitting such agreements when applicable to work to be performed at the site of the construction and retaining the Section 8(b)(4) bar against coercive enforcement. *Therefore, building construction unions came away from the 1959 Congressional action in exactly the same position they were in prior to those enactments.* They were saved from the outright ban of Section 8(e), but they neither gained nor lost protection. Congress, taking a photograph of the law at it then existed, simply preserved to labor organizations in the construction industry the same rights which they enjoyed under *Sand Door* and prior court and Board decisions preceding the

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[11] *Carpenters Local 1976* v. *N.L.R.B. (Sand Door)*, 357 U.S. 93 (1958).

enactment of Section 8(e). Then Senator John F. Kennedy specifically addressed this subject in the Congressional debates. He said:

> *"Since the [8(e)] proviso does not relate to Section 8(b) (4),...*
>
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* (emphasis added) II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, 1433.

Additionally, Represenative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting of work to be done at a construction site.[12]

Senator Kennedy was also careful to point out that the proviso did not change the law as enunciated by this Court in *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951). Senator Kennedy said:

> "This provisio affects only Section 8(e), and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341 U.S.

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[12] Congressman Barden stated: "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (emphasis added) II Legislative History of Labor Management Reporting & Disclosure Act of 1959, 1715.

675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor Management Reporting & Disclosure Act of 1959, at 1433.

Later pronouncements by this Court are further testimony to the continued vitality of *Denver Building Trades* and *Moore Drydock*.[13] See *N.L.R.B.* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975); *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667 (1961). The rule of each of these cases, recognizing the separate interests of each contractor and its employees on a construction project, would be very seriously eroded and eventually eradicated if unions in the construction industry were permitted to continue to *coercively* obtain agreements of the type at issue here, which would apply across craft lines and at all future jobsites of the employer. Surely, if the Court declines this opportunity to resolve this vital question, construction unions will have taken a giant step forward toward the achievement of those common situs objectives so long denied to them by Congress.[14]

In *Colson & Stevens*, the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the

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[13] *Sailors Union of the Pacific*, 92 NLRB 547 (1950).

[14] See, for example, H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

type . . ." here involved. 137 NLRB at 1651. The Board found that proposition explicit in *Sand Door*. Then, quoting Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts excepted by the proviso, or *with respect to the legality of a strike to obtain such a contract*, the Board reached the necessary conclusion that the picketing of Colson violated Sections 8(b)(4)(A) and (B) of the Act.

The decision of the unanimous five-member Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association*, 310 U.S. 534, 542-543; *Ozawa* v. *United States*, 260 U.S. 178, 194." 137 NLRB at 1652, n. 7 (emphasis added).

It is illogical to assume that the same Congress, which carefully drafted Section 8(f) of the Act[15] so as to pro-

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[15] 29 U.S.C. §158(f).

hibit coercion to obtain a pre-hire agreement from a primary employer, would allow coercion to obtain a protected "hot cargo" agreement in an admittedly secondary context. Furthermore, it makes no sense whatsoever to permit a union to shut down construction over a broad area, possibly covering many states and hundreds of sites, valued perhaps in the billions of dollars, in an effort to obtain an 8(e) clause, while prohibiting that same union from striking one single job to enforce the clause once obtained. Now, for the first and perhaps last time, this Court has an opportunity to put the law back on the track and to effectuate the Congressional design so clearly mirrored in the legislative history of the 1959 amendments.

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is urged to grant petitioner's request for certiorari on all of the issues raised, but most particularly with respect to Question No. 3, to which this brief is addressed.

Respectfully submitted,

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Nos. 80-1798, 80-1808 and 81-91

IN THE

Supreme Court of the United States

October term, 1981

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ALEXANDER L. STEVAS,
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WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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QUESTIONS PRESENTED

Section 8(e) of the Labor Management Relations Act makes it an unfair labor practice for an employer and a union to enter a contract whereby the employer agrees "to cease doing business with any other person." The "construction proviso" to § 8(e) creates an exception for certain agreements between unions and employers in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held that the scope of the construction proviso is limited to the Congressional purpose when enacting it, and that a subcontractor clause which prohibited the general contractor from doing business with any subcontractor that had no labor contract with the union (a signatory clause) and which thereby organized subcontractors' employees from the top down, was prohibited by § 8(e) and was not protected by the construction proviso because not within the proviso's purpose. The union in *Connell* did not represent any of the general contractor's employees on any of the general contractor's construction sites.

1. Whether the "collective bargaining relationship" between a union and a general contractor which arises when the general contractor may employ one or more of the union's members for a time on a single job invokes the protection of the construction proviso for the union's use at all times on all jobs, throughout the life of the labor contract, of a signatory secondary boycott subcontractor clause which compels subcontractors' employees to join this union without their consent and yet fails on most or many jobs to serve the Congressional design of avoiding friction between the union's members and nonunion workers.
2. Whether construction unions are free, because of the construction proviso to § 8(e) of the LMRA, to secure "from any general contractor vulnerable to picketing" (*Connell*, 421 US at 633) a broad signatory secondary boycott subcontractor clause which organizes subcontractors' employees from the top down on all jobs even though the union's members employed by the general contractor are not present on the job, so the union is not part of the "close community of interests" there and the clause does not have the redeeming virtue of avoiding jobsite friction between the union members and nonunion workers, simply because the clause is in a "collective bargaining relationship"—which in practice means that the clause is applicable at all times to all jobs

simply because the general contractor may employ the union's members either now or in the future for at least some time on some job.

3. Whether the majority decision below is contrary to *Connell*, supra, because *Connell* held a subcontractor clause to be outside the protection of the § 8(e) construction proviso when the general contractor employed none of the union's members on any of its jobs, yet the majority below held an identical subcontractor clause to be protected by the proviso and enforceable at all times on all jobs simply because it was contained in an agreement in a "collective bargaining relationship"—which means in practice that the general contractor may employ a union member on some job some time.
4. Whether a group boycott agreement which excludes from a large portion of the construction market any subcontractor whose employees have elected to be nonunion or have selected a different union, although the subcontractor pays wages and benefits equal to or more than the union's standard, is legalized by the construction proviso to § 8(e) even though the agreement applies when none of the union's members employed by the general contractor are present on the construction site, so the purpose of the clause is not to avoid friction between the union members and nonunion workers employed by the subcontractors but is to organize subcontractors' employees from the top down.

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IN THE

Supreme Court of the United States

October term, 1981

Nos. 80-1798, 80-1808 and 81-91

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

OPINIONS BELOW

The opinion of the limited *en banc* panel of the court of appeals is reported at 654 F2d 1301. The opinion of the three-judge panel of the court of appeals is reported at 609 F2d 1341. The decision and order of the National Labor Relations Board is reported at 239 NLRB 274.

JURISDICTION

The judgment of the limited *en banc* panel of the court of appeals was entered on April 17, 1981. Woelke & Romero Framing, Inc. filed a petition for a writ of certiorari on April 29, 1981, Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. filed a petition for a writ of certiorari on April 29, 1981, and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. filed a petition for writ of certiorari on July 14, 1981, invoking the jurisdiction of this Court under 28 USC § 1254(1). All three petitions were granted on October 5, 1981.[1]

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act are as follows:

> Sec. 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (29 USC § 157)
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> Sec. 8(b)(4)(A):"(b) It shall be an unfair labor practice for a labor organization or its agents—
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[1]Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, it is noted that all parties to the proceeding in the Court below are shown in the caption of the case in this Court, except for International Union of Operating Engineers, Local No. 701.

The list of related entities required by Rule 28.1 of the Rules of the Supreme Court of the United States is provided on page 2, footnote 1, of AGC's Petition for Writ of Certiorari.

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e);" (29 USC § 158(b)(4)(A))

Sec. 8(e): "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or in industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception." (29 USC § 158(e))

STATEMENT OF THE CASE

A. The subcontractor clause and its effects.

1. **The subcontractor clause.** A clause in the AGC[2]-Local 701[3] labor agreement prohibits AGC's members from subcontracting jobsite operating engineer work to any subcontractor who has not signed a labor agreement with Local 701.[4] The clause applies at all times to all jobs (J.A. 11).

The clause is not satisfied by the subcontractor paying wages and benefits equal to or even more than the AGC-Local 701 agreement. The subcontractor must be signatory to Local 701's agreement which requires all employees performing operating engineer work to join Local 701 (J.A. 11).

The Local 701-AGC agreement is effective for a five-year period. It covers all of the state of Oregon and 5-1/2 counties of Southwest Washington (J.A. 9). The 200 AGC general contractors bound by the agreement perform a substantial portion of the construction work throughout this area (J.A. 11).

2. **The effects of the clause.** The effects of this clause are of two kinds and are far reaching. First, the clause is a group boycott forcing all AGC contractors to not deal with any nonsignatory subcontractor. Second, the clause is a broad top-down organizing device forcing all employees of subcontractors doing operating engineer work to be members of Local 701; for to get any work on any AGC job the subcontractor must require all his employees doing such work to join Local 701 whether they want to or not.

By this group boycott, subcontractors whose employees have elected to be nonunion or have selected a different union, are excluded from a large portion of the construction market.

The reach of these effects warrants emphasis. For it is their excessive reach that brings the issue before this Court. Since the clause applies at all times to all AGC jobs, its boycott and top-down

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[2] "AGC" is the Oregon-Columbia Chapter, Associated General Contractors of America, Inc. It represents about 200 general contractors for whom it negotiates labor contracts with various unions, including Local 701 (J.A. 9, 11). (All references herein to "J.A." are to Volume II of the Joint Appendix).

[3] "Local 701" is Local 701 of the International Union of Operating Engineers.

[4] The subcontractor clause states: "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm or company who does not have an existing labor agreement with [Local 701] covering such work." (J.A. 9-10)

organizing occur even though there are no Local 701 members employed by the general contractor present on the job. At all such times (which are common) there is no possibility of jobsite friction between Local 701's members and a subcontractor's nonunion employees, so avoiding such friction can be no justification for the clause. At all such times the sole function of the clause's signatory requirement is to organize subcontractors' employees from the top down.

Such times are frequent because there are many jobs where the AGC contractors employ no member of Local 701 or do so for only a limited time. The work performed by operating engineers is, in general, the operation of heavy construction equipment such as shovels, backhoes, loaders, tractors, etc. Much of this work in the building industry is normally subcontracted to independent subcontractors. On many projects such equipment is used only occasionally. For example, on a building job the only such equipment may be excavating equipment to dig the foundation early in the project and then grading equipment late in the project for landscaping; although the general contractor might employ members of Local 701 to excavate the foundation, they will have no contact with employees of a landscaping subcontractor who a year later operate grading equipment on the job. The employees excavating the foundation are as much separated from the landscape employees as when they are on two separate projects. There can be no friction between them. At all these times when the general contractor employs no member of Local 701 on the particular job, the sole function of the signatory requirement of this subcontractor clause is to organize subcontractors' employees from the top down.

Nor is the top-down organizing even confined to AGC members' jobsites. The Local 701 agreement required of the subcontractor by this clause applies to all of the subcontractor's jobs and to all his operating engineer employees on those jobs, requiring them all to join Local 701. And on each of the subcontractor's jobs the same clause applies to require the subcontractor's subcontractors to sign a Local 701 agreement with the same requirements. And so on; the clause extends to every job and to every tier of subcontracting, to all who have any subcontracting relationship to anyone who has such a relation at any time on any AGC job.

B. The decisions below.

1. **The Board's decision.**[5] The Board held that this subcontractor clause is a secondary boycott within § 8(e)'s general proscription, but is saved by the construction proviso to § 8(e).[6] The Board reasoned that the proviso is to be applied "literally" (*Woelke*, supra, 239 NLRB at 248) to any clause, such as this, in a "collective bargaining relationship." Although this Court in *Connell*[7] held a virtually identical clause to be outside the proviso based on interpreting the proviso according to the Congressional policies underlying its enactment, the Board held those policies irrelevant here (*Woelke*, supra, 239 NLRB at 249). The Board found this clause to be within the proviso's literal terms and therefore protected by the proviso without regard to or even in violation of Congressional aims, because there is here a "collective-bargaining relationship." The Board did so without even any inquiry into the clause's broad top-down organizing through a group secondary boycott or into its failure to avoid union-nonunion jobsite friction.

2. **The three-judge panel's decision.** A three-judge panel of the Ninth Circuit Court of Appeals unanimously reversed. It rejected the Board's rule that the proviso is to be literally applied to any clause in a "collective bargaining relationship" (609 F2d at 1347-1348; JA 56-57), and held the clause outside the proviso and in violation of § 8(e).

It held that "the purpose of the exception dictates its scope" in all cases (609 F2d at 1350; J.A. 60) and that the proviso's purpose is to avoid the jobsite friction that may occur when members of the union are required to work with nonunion workers of the same craft;[8] that

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[5]The Board's ruling is based on a charge (J.A. 1) filed by petitioner Associated Builders and Contractors of America, Inc. The Board considered this case with three others involving the same issue, including *Carpenters Local 944 (Woelke & Romero Framing, Inc.)*, 239 NLRB 241, 99 LRRM 1580 (1978). The Board's principal analysis was in the *Woelke* case, which the Board followed herein. *Woelke* is also before this Court, consolidated with this case.

[6]The Board held that a "self-help" clause in the contract, in conjunction with the subcontractor clause, violated 8(e) and was not protected by the construction proviso. The court below affirmed the Board on this point. This issue was not raised in any petition for certiorari and is not before this Court.

[7]*Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975).

[8]The court followed its own prior holding in *ACCO Construction Equipment v. NLRB*, 511 F2d 848 (9th Cir 1975), *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553 (DC Cir 1966), and this Court's *Connell* decision.

this clause "goes well beyond" that purpose since it forbids use of all nonsignatory subcontractors "regardless of whether workers of the signatory union will also be employed on those sites" (609 F2d at 1350; J.A. 60).

The panel found that this clause is "precisely the kind of instrument for 'top-down' organizing which the Supreme Court condemned in *Connell*" (609 F2d at 1350; J.A. 61).

3. **The partial en banc panel's decision.** On rehearing, a limited *en banc* panel reversed in a seven-to-four decision. Although agreeing the clause is within the general prohibition of § 8(e), the majority held the clause is within the construction proviso because it is in a "collective-bargaining relationship."

Although this is the same conclusion reached by the Board, the *en banc* majority's[9] reasoning is different. Unlike the Board, the majority sought the proviso's meaning by examining the "peculiarities" of the construction industry and the manner in which Congress addressed them when adopting § 8(e). The only such "peculiarities" described by the majority are short job duration (654 F2d at 1309-1310; J.A. 72-73); "shoulder-to-shoulder friction between union and nonunion workers" on the same jobsite (654 F2d at 1314, 1317; J.A. 83, 88-89); and the "severe problems not only of *maintaining wage levels, but of protecting benefits* . . . " since at the jobsite " . . . *working conditions applicable to one set of workers may very well affect others working on the same project*" (654 F2d at 1316-1318; J.A. 87-89; emphasis added).[10] The majority concluded that these interests require that signatory subcontractor clauses be protected whenever they are in a "collective bargaining relationship."

The majority relied on three short statements out of the legislative history (discussed below at pp 39-48) but recognized that its interpretation of them is "not free from doubt" (654 F2d at 1312; J.A. 78). It "concedes" that *Connell* "may well lean in a direction contrary to our views" (654 F2d at 1320; J.A. 94), and that *Connell* " . . . contains considerable emphasis on problems of shoulder-to-

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[9]We will hereinafter refer to the *en banc* majority simply as the "majority" below.

[10]Although the majority refers vaguely to a "complex" of distinguishing factors in the construction industry (654 F2d at 1316; J.A. 86), the *only* factor it ever specifically describes other than jobsite friction and short job duration, is the need to protect working conditions at the jobsite.

shoulder friction between union and non-union workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements " (654 F2d at 1314; J.A. 83). But the majority nevertheless permitted the top-down organizing of this group boycott whether or not "union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction" (654 F2d at 1312; J.A. 78).

4. The dissenting opinions of the en banc panel. The analysis of the four dissenting judges emphasized *Connell's* "concern with the 'top-down' organizing effect of union signatory clauses" (654 F2d at 1325; J.A. 103); although "any union signatory clause has some 'top-down' organizing effect" they oppose the majority's broadening of this effect (*Ibid*). They noted that prior reviews of the proviso's legislative history by this circuit court, as well as others, had "concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers"[11] and that the Board itself had "previously believed: '[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite.'"[12] "[T]he legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction" (654 F2d at 1326; J.A. 106).

The dissent finds that the "bare references" in the legislative history to the pattern of bargaining do not support the view that if "some" broad subcontractor clauses existed in 1959 then Congress intended that any such clause be permitted, since this is directly contrary to "curbing 'top-down' organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included Section 8(e)" (654 F2d at 1326-1327; J.A. 106-107).

An additional opinion by three of the dissenters emphasised that maintenance of union standards—on which the majority relies—can be accomplished "by a common, *primary* restraint: the union

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[11]The dissent cites *ACCO, supra*, 511 F2d 848, 851 (9th Cir 1975); *Drivers, Salesmen, Etc., supra*, 361 F2d 547, 553 (DC Cir 1966); *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F2d 636, 640 (3rd Cir 1964).

[12]The dissent quotes from *Intl. Union of Operating Engineers, Local 542*, 216 NLRB 408, 409 (1975), enf'd, 532 F2d 902 (3rd Cir 1976), cert. den. 429 US 1072 (1977).

standards clause" and thereby "avoid many of the evils inherent in the restraints here" of a union signatory clause (654 F2d at 1328; J.A. 109, emphasis in original). They conclude that "the proviso should not be read to permit [such] restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction" (*Ibid*).

SUMMARY OF ARGUMENT

This deceptively simple clause imposes broad restraints on both employers and employees. Contractors cannot deal with disfavored subcontractors, who are excluded from a large share of the construction market unless they require their employees to join Local 701. The wishes of the subcontractors' employees are ignored. They are organized from the top down. To work for any subcontractor that does any work on any AGC job, the employee must join Local 701 whether he wants to or not.

The boycott is not confined to subcontractors who derive a competitive advantage by paying substandard wages or benefits. Under this clause it matters not that the subcontractor pays as high or higher wages and benefits than under the union contract. It matters not that the subcontractor can perform a better job or do so by more efficient methods. Under this clause the sole test of whether a contractor is favored or blacklisted is whether he has signed the Local 701 contract.

Nor is the clause limited to times when Local 701's members employed by the contractor are present on the job. Its purpose and function, therefore, cannot be to avoid the friction that may result when Local 701's members are asked to work alongside nonunion workers at the same construction site. The only function of the clause's signatory requirement whenever Local 701 members are not present is to organize subcontractors' employees from the top down.

The clause is clearly illegal unless it is within the construction proviso to § 8(e).

In *Connell Co. v. Plumbers & Steamfitters*, 421 US 616 (1975), this Court held a nearly identical clause to be outside the proviso because it did not serve the proviso's purpose. Just as here, the clause in *Connell* was not addressed to the "close community of interests" (*Id* at 630) on a construction site where employees of many employers work side by side. The clause "was not designed to protect" the union's members "from having to work alongside nonunion men"

since the clause "was not limited to jobsites on which [the union's members] were working" (*Id* at 631). Instead, the *Connell* clause served as "an almost unlimited organizational weapon" that organized construction employees from the top down (*Id* at 631). Because the clause here, like that in *Connell*, is a broad top-down organizing weapon and is not designed to protect Local 701 members from working alongside nonunion men, it is outside the proviso and is unlawful.

As held in *Connell*, consistent with a long line of precedent, § 8(e) with its proviso, as well as other provisions of the Act, must not be read literally but "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment" to determine the "'intention of its makers'" (*Id* at 628). This principle "has particular application in the construction of labor legislation which is ' . . . the result of conflict and compromise . . . '"[13] and has particular significance here to § 8(e)'s construction proviso, which was an eleventh-hour addition to the 1959 Act to break a deadlock in the Conference Committee over the most controversial portion of the bill—the secondary boycott provisions. Because there was little time for congressmen to absorb this last-minute addition and because there were no committee hearings to elucidate its meaning, the necessity for "'reconstitut[ing] the gamut of values current at the time . . . '" (*Woodwork*, supra, 386 US at 620) in order to determine the intent of Congress is particularly acute for this statute.

A fundamental and pervading aim of national labor policy is to protect employees' free choice in selecting their bargaining representative. Although the Wagner and Taft-Hartley Acts each implemented this policy, an investigation by the Senate's McClellan Committee in 1957 to 1959 disclosed, among other labor abuses, widespread use by unions of various economic weapons to organize employees against their wishes from the top down. One of the principal weapons was the "hot cargo" agreement by which employers agreed to boycott employers with whom the union had a dispute. Lengthy committee testimony and floor debate almost uniformly condemned such practices; "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees" (*Connell*, supra, 421 US at 632).

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[13]*Woodwork Manufacturers Asso. v. NLRB*, 386 US 612, 619 (1967).

The construction industry has peculiarities which were accommodated by the 1959 Act, but none of them justifies this clause. Because of the short duration of jobs in the construction industry Congress enacted § 8(f), which permits voluntary prehire labor agreements; but it was never asserted that the short duration of jobs justifies forcing subcontractors to sign union agreements against their employees' wishes. "The only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows 'prehire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation" (*Ibid*).

Reconstructing the "gamut of values" in 1959 also requires examination of Congressional reaction to this Court's decision in *NLRB v. Denver Bldg. & Constr. T. Council*, 341 US 675 (1951), since the construction proviso "seems . . . to have been adopted as a partial substitute for an attempt to overrule this Court's decision in [*Denver*]" (*Connell*, supra, 421 US at 629). In *Denver* the general contractor engaged a nonunion subcontractor who paid wages substantially below union scale. All other workers on the job were union. The union stated "union men could not work on the job with nonunion men" (341 US at 679) and picketed the job, causing a strike by all union workers. The Court held this violated § 8(b)(4). Justice Douglas dissented stating, "All the union asked was that union men not be compelled to work alongside nonunion men on the same job" (*Id* at 692).

Strong efforts were made to include a provision in the 1959 Act to overrule *Denver*, but these efforts failed in both chambers. The *Denver* debate focused on the concern expressed by Douglas for avoiding the frictions that may occur when union workers are compelled to work alongside nonunion workers on the same job and on construction unions' need to protect their wage standards from the threat posed by workers on the same project paid at subunion wages. Similarly, opponents of a general ban on boycott agreements repeatedly emphasized that such agreements were needed to protect union wage standards. Thus the debates make clear that Congress perceived that a general prohibition against agreements not to do business with others would prohibit agreements ("union standards" clauses) to refrain from doing business with those paying subunion wages. If a "union standards" subcontractor clause were to be lawful, in Congress' view, an exception would have to be made from the § 8(e) ban on secondary agreements. As a "partial substitute"

for an anti-*Denver* bill, the § 8(e) proviso was intended to meet Justice Douglas' concern with union-nonunion friction on the jobsite and to equip construction unions to meet the special threat to wage standards that arose when workers paid at subunion wages worked shoulder-to-shoulder with union workers.

This clause does not fall within these purposes or within Congress' policies when enacting the proviso. The compulsory unionism enforced by this clause is in direct conflict with the Act's "major aim" (*Connell*, 421 US at 632) of limiting top-down organizing, and it cannot be justified by any of the policies stated by Congress as a reason for special construction industry considerations: its signatory requirement goes beyond protecting union standards on construction jobs; its application when no Local 701 members are present goes beyond avoiding jobsite friction; its prohibition against subcontractors' employees selecting any union other than Local 701 cannot be justified as a means to avoid union-nonunion friction.

The Board and majority below erred because they disregard these Congressional purposes whenever the clause is in a "collective bargaining relationship." The proviso is not to be applied according to its purpose only some of the time and in disregard of its purpose at other times. Furthermore, in the construction industry where multi-employer bargaining and prehire agreements are prevalent, a "collective bargaining relationship" often involves only the most tenuous of relationships; it exists merely by a contractor employing one union member on one job sometime, or merely by the union demanding that the contractor do so in the future. Such labels cannot justify this broad clause whose sole function is frequently to organize subcontractors' employees, at large, from the top down. The union has a meaningful representative interest on a job only when its members are present there. At other times this union is not part of "the close community of interests there" (*Woodwork*, supra, 386 US at 639) which the proviso is designed to accommodate; at such other times "the construction industry is no different from any other" (*Ibid*) with respect to this union's valid interests.

The analysis of the majority below is bottomed in the erroneous assumption that such a clause is needed for "maintaining wage levels [and] protecting benefits" (654 F2d at 1316; J.A. 87). But these interests can be protected by a "union standards" clause which requires subcontractors to adhere to union standards—without need

for a union signatory requirement that organizes from the top down.

Disregarding the Act's lengthy legislative history, the majority below seeks support in three short legislative statements to the effect that the proviso is to "avoid serious damage to the pattern of bargaining" and is to preserve existing law. But none of the statements addresses the specific issue here of whether the scope of the proviso was intended to allow a signatory requirement when the union's members are not even present. These brief statements were rejected by this Court in *Connell* as a test for interpreting the proviso. The majority reasons that under these statements a subcontractor clause is lawful if there was "some such clause" which was legal in 1959 (654 F2d at 1314; J.A. 82). But *Connell* considered and rejected that test. *Connell* measured a clause virtually identical to this one against the policies embodied in the 1959 Act without any inquiry concerning the existence of "some such clause" in 1959 and without even suggesting that the state of the law in 1959 had any bearing on this question.

An examination of the 1959 "pattern of bargaining" and 1959 law confirms the wisdom of this Court in rejecting them as a basis for interpreting the proviso. The majority below relies on a study of 1959 subcontractor clauses, but the study is so superficial that the Board's General Counsel characterized it as "inconclusive" on this question, and made his own study, which showed there was no consistent pattern in 1959 and that union signatory clauses in any form occurred in only eight (fewer than twelve percent) of the contracts sampled. Moreover, the legality of such clauses in 1959 was uncertain. While this Court's 1959 *Sand Door (Local 1976, U.B.C.& J.* v. *NLRB*, 357 US 93 (1958)) decision expressly left that question open, the opinion strongly implies that such clauses were not judicially enforceable. Based on *Sand Door* and certain NLRB decisions, key legislators in both chambers expressed the view that secondary boycott clauses were unlawful.

The uncertain state of the law in 1959, the varied views expressed in Congress on this question, and the patchy, inconclusive evidence concerning any "pattern" of signatory clauses in 1959, all support *Connell's* refusal to allow this important statute to pivot on historical esoterica wholly unrelated to the basic purposes of the 1959 Act. Because those same basic purposes must provide the standard against which the clause here is measured, this clause, like that in *Connell*, must fall.

ARGUMENT

A. This subcontractor clause is not within the purpose of the construction proviso and therefore is not within the proviso.

1. The construction proviso to § 8(e) is not to be literally applied, but is limited to the Congressional purpose when enacting it.

As repeatedly held by this Court, § 8(e) and the proviso are not to be literally applied. The union argued for a literal interpretation of the proviso in *Connell* (421 US at 626-627) and this Court rejected it, stating:

> " . . . This Court has held . . . that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment:
>
> "'It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers" *Holy Trinity Church v. United States*, 143 US 457, 459' *National Woodwork Mfrs. Assn. v. NLRB*, 386 US 612, 619 (1967)." (421 US at 628)

In *National Woodwork*, cited by *Connell*, the Court went on to state:

> " . . . That principle has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.' . . . " (386 US at 619)[14]

As shown by the cases *Woodwork* cites, this Court has frequently applied this principle when interpreting the Act.[15]

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[14]In *Woodwork* the Court held that although 8(e) states literally that it applies to "any contract" to "refrain from handling . . . any of the products of any other employer" nevertheless an agreement that "no member of this union will handle . . . any doors . . . which have been fitted prior to being furnished on the job" (386 US at 616) is not within § 8(e).

[15]For example, *NLRB v. Fruit & Vegetable Packers*, 377 US 58 (1964), held that peaceful consumer picketing is excepted from § 8(b)(4), although its exception literally states it is for publicity "other than picketing"; *Mastro Plastics Corp. v. NLRB*, 350 US 270 (1956), held that an employee who strikes to protest unfair labor practices is not within § 8(d), although § 8(d) literally states it applies to

The basic inquiry in this case is, therefore, to determine the Congressional purpose when it enacted the construction proviso.

2. This Court has ruled that the Congressional policies when enacting the proviso were to limit top-down organizing and the proviso's purpose is confined to the "close community of interests" on construction sites where friction may occur if the union's members have "to work alongside nonunion men" (*Connell*, 421 US 616 at 630, 631).

This Court has examined the purpose of the construction proviso on two occasions, once briefly and once in depth. In *Woodwork*, supra, the Court briefly observed that the construction proviso is

> " ... a measure designed to allow agreements pertaining to certain secondary activities on the construction site *because of the close community of interests* there ... ." (386 US at 638-639, emphasis added).

Woodwork cited *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F2d 636 (3rd Cir 1964) which states:

> " ... This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists *to work alongside non-union men on the same project*. ... " (332 F2d at 640, emphasis added)

In *Connell*, supra, the Court reviewed in depth the proviso's purpose. The Court held a subcontractor clause virtually identical to this one to be outside the proviso's purpose and therefore outside the proviso.[16]

Connell's analysis of the purpose of the proviso is as follows: One of the "major aims" of the 1959 Act was to limit precisely the top-down organizing which the clause entailed (421 US at 632). The proviso is an exception to that limitation. It is also an exception to § 8(e) which "broadly proscribed using contractual agreements to

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"[a]ny employee who engages in a strike"; *NLRB v. Drivers Local Union*, 362 US 274 (1960), held that restraining and coercing employees by peaceful picketing is not within § 8(b)(1)(A), although that section literally states it is an unfair labor practice for a union to "restrain or coerce" employees.

[16]The subcontractor clause in *Connell* stated "(if) the contractor should contract or subcontract any of the [covered work] ... said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 ... " (421 US at 620).

achieve ... economic coercion" for secondary objectives (*Id* at 628). The Court states that the proviso "seems ... to have been adopted as a partial substitute for an attempt to overrule this Court's decision in *NLRB v. Denver Building & Construction Trades Council*, 341 US 675" (*Id* at 629), and referred (*Id* at 630) to the brief dissent of Justice Douglas in *Denver* where he stated:

> " ... All the union asked was that union men *not be compelled to work alongside nonunion* men on the same job ... " (341 US at 692, emphasis added).

The Court noted that Congress' discussions of "both the § 8(e) proviso and the attempt to overrule *Denver* ... focused on ... the close relationship between contractors and subcontractors at the jobsite," citing portions of the Congressional Record which described a jobsite as a place "where all the men are employed on the *same project* ... [*where*] *they work side by side*."[17] The Court contrasted the construction proviso to the broader exemption provided in the garment-industry proviso, stating:

> " ... Congress did not afford construction unions an exemption from § 8(b)(4)(B) or *otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon* ... " (*Id* at 630, emphasis added).

Connell stated that "[i]n keeping with these limitations" the Court in *Woodwork* had interpreted the proviso as "'designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there.' " (*Ibid*). *Connell* quoted with favor a court of appeals decision that "'[t]he purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside nonunion men on the same construction site.' "[18] The Court cited Douglas' dissent in *Denver* (quoted above), and the statement quoted above from *Essex County v. NLRB*, *supra*, 332 F2d 636, 640 (3rd Cir 1964).

Connell then applied "these policies" to the subcontracting

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[17] 421 US at 629-630, citations in footnote 9; quotations from Representatives Thompson and Udall (105 Cong. Rec. 15541) and memorandum by Senator Elliott (*Id* at 15551-15552); 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter Leg Hist) 1577, 1588 (emphasis added).

[18] *Ibid*, quoting from *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553 (DC Cir 1966).

agreement before it (*Id* at 631). It found the agreement "not ... related to any of these policies" (*Ibid*). The agreement "was not designed to protect Local 100's members" from "having to work alongside nonunion men ... since it was not limited to jobsites on which they were working" (*Ibid*). *Connell* observed that if the subcontracting clause were approved then

> " ... The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.
>
> "It is highly improbable that Congress intended such a result. One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. ... " (421 US 631-632)

The Court noted that "[c]onstruction unions are fully covered" by other sections of the Act (such as § 8(b)(7)) which were designed to limit top-down organizing; that the "only special consideration given [construction unions] in organizational campaigns is § 8(f), which allows 'prehire' agreements" but this was done "only under careful safeguards preserving workers' rights to decline union representation" (*Id* at 632).[19]

The final paragraph of *Connell's* analysis of this point begins:

> "These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests. ... " (*Id* at 633)

Connell employed none of the union's members on any of its jobs.

[19]The Court also observed that "Congress may not have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers" (*Id* at 632-633). The Court subsequently confirmed this in *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 348, n. 10 (1978).

Because of this, no "collective-bargaining relationship" existed between Connell and the union. However, the foregoing shows that *Connell's* analysis was *not* based on the absence of a "collective-bargaining relationship." Rather, it was based on the broad top-down organizing impact of the subcontractor clause in a context in which the union's members were not present on the jobsite. The close community of interests when employees work side by side did not exist. Without any union member on the jobsite there was no hazard of the union-nonunion friction which prompted enactment of the proviso, and thus no reason to tolerate the violation of workers' rights to decline union representation.

3. Lower courts and the Board have ruled that the proviso's purpose is to avoid union-nonunion friction.

In *ACCO Construction Equipment, Inc. v. NLRB*, 511 F2d 848 (9th Cir 1975), a clause in the AGC-Operating Engineers labor agreement prohibited the general contractor from contracting out jobsite equipment repair unless performed by members of the Operating Engineers Union. The clause was held to violate § 8(e) and to be outside the proviso's protection because it applied when there was no potential for jobsite friction. The Court rejected a literal application of the proviso, stating:

> " . . . this ignores the purpose of the congressional exemption. Although the legislative history of the proviso is ofttimes vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and the employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site.' *Drivers, Salesmen, Etc., Local 695 v. NLRB*, 124 U.S. App.D.C. 93, 361 F.2d 547, 553 (1966) (emphasis added). What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen." (511 F2d at 851, emphasis in original)[20]

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[20]This interpretation is also consistent with the principle that "as an exception to

Similarly, in *Intl. Union of Operating Engineers, Local 542 (York County Bridge, Inc.)*, 216 NLRB 408, 88 LRRM 1405 (1975), enf'd 532 F2d 902 (3rd Cir 1976), the Board struck down two clauses which provided that union members would not be required to operate equipment belonging to a nonsignatory. Although the employer employed members of the union and thus a "collective bargaining relationship" was present, the clauses were held outside the scope of the proviso because they went beyond the proviso's purpose of avoiding jobsite friction:

> " ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite. ...
>
> "The provisions [in question] have a different and broader effect. Neither [provision] is limited to situations where the boycotted supplier of the equipment has any employees at the jobsite. ... " (216 NLRB at 409, 88 LRRM at 1407).[21]

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the Landrum-Griffin Act's overriding aim to prohibit secondary boycotts, [the construction proviso] is strictly construed" *Drivers, Salesmen, Etc., Local Union No. 695 v. NLRB*, 361 F2d 547, 553, n. 23 (DC Cir 1966).

[21]See also *Associated Gen. Contractors of Cal., Inc. v. N.L.R.B.*, 514 F2d 433, 439 (9th Cir 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite."); *Essex County & Vic. Dist. Coun. of Carpenters, Etc. v. N.L.R.B.*, supra, 332 F2d 636, 640 (3rd Cir 1964) (quoted above, p. 15; *N.L.R.B. v. Intern. Union of Op. Engineers, Etc.*, 532 F2d 902, 907 (3rd Cir 1976) (the "rationale" of the proviso is " ... eliminating friction between union and nonunion workers on a jobsite ..."); *Operating Engineers Local 12 (ACCO Construction Equipment, Inc.)*, 204 NLRB 742, 752 (1973), enf'd 511 F2d 848 (9th Cir 1975) (" ... the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite ..."); *Operating Engineers v. Neilsen & Co.*, 92 LRRM 2861, 2863 (D Id 1975) (the proviso "was designed to alleviate the frictions that may arise at a construction site when union men work alongside nonunion men"); *Long v. Floorcraft Carpet Co.*, 95 LRRM 3143, 3144 (D Or 1977) (" ... 'the purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work *continuously* alongside nonunion men on the same construction site,' ..." quoting with approval from *ACCO*, supra, at 851 (emphasis in original); *Long v. Pam's Carpet Service*, 95 LRRM 3145, 3146 (D Or 1977); *Waggoner v. R. McGray, Inc.*, 432 F Supp 580, 583 (CD Cal 1977), rev'd on other grounds, 607 F2d 1229 (9th Cir 1979).

The statement of the majority below (654 F2d at 1315, n. 25; J.A. 84, n. 25) that subcontractor clauses have been "consistently" upheld is erroneous, as shown by the foregoing cases. Furthermore, *none* of the cases cited by the majority for upholding a subcontractor clause (654 F2d at 1315 n. 25; J.A. 84, n. 25) addressed the issue here of the acceptability of top-down organizing when there is no countervailing value of avoiding jobsite friction nor any other justifying interest.

4. The legislative history confirms that Congress had no intent to license subcontractor clauses such as this which act as broad top-down organizing weapons.

a. The Wagner Act's fundamental aim was to protect employees' free choice of their representative. The 1935 Wagner Act declared it "the policy of the United States" to protect "the exercise by workers of full freedom of ... designation of representatives of their own choosing."[22] It implemented this policy by providing for the employees' "right to bargain collectively through representatives of their own choosing" (Section 7, 49 Stat 452), for procedures to determine employees' choice by secret-ballot elections (Section 9), and making an unfair labor practice of employer conduct which restrains this employee right (Section 8(a)(1), 49 Stat 452).

Senator Wagner's statement regarding the Act emphasized: "Most important of all, it does not force or even counsel any employee to join any union" and it "does not favor any particular union" but "seeks merely to make the worker a free man" (78 Cong. Rec. 2371 (1935)).

In its first ruling on the Wagner Act, this Court stated that the Act was to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer" and observed: "That is a fundamental right ...."[23] This Court's subsequent decisions under the Wagner Act further emphasized that "Congress was intent upon the protection of the right of employees to ... the selection of representatives of their own choosing" and that this is "the fundamental policy of the Act"[24]—that this employee "freedom of choice ... is the essence of collective bargaining."[25]

b. The Taft-Hartley Act expanded on employees' right of free choice, including the right to refrain from union activity. The 1947 Taft-Hartley Act reaffirmed that "the policy of the United States" is

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[22]Section 1 of Wagner Act, July 5, 1935, 49 Stat 449. Similar provisions were contained in Section 7(a) of the National Industrial Recovery Act (48 Stat 195) and Section 2 of the Railway Labor Act of 1934 (48 Stat 1185).

[23]*NLRB v. Jones & Laughlin S. Corp.*, 301 US 1, 33 (1936).

[24]Justice Hughes in *NLRB v. Fansteel Metal. Corp.*, 306 US 240, 255, 257 (1939).

[25]Justice Douglas in *International Assn., Etc. v. NLRB*, 311 US 72, 79 (1940).

"protecting the exercise by workers of full freedom of ... designation of representatives of their own choosing." (29 USC § 151). It expanded on implementing this policy by confirming the employees' "right ... to bargain collectively through representatives of their own choosing" and adding the "right to refrain from any or all of such activities"(Section 7, above, p. 2), making more explicit provision for secret elections to determine employee choice (Section 9), and making an unfair labor practice of both employer and union conduct which restrains this employee right (Sections 8(a)(1) and 8(b)(1); 29 USC § 158(a)(1) and 29 USC § 158(b)(1)). In *Radio Officers*[26] the Court held that under Taft-Hartley the employees' right to refrain from joining a union is protected equally with their right to join, and that employees' jobs are insulated from their choice:

> " ... The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood...." (*Id* at 40, footnote omitted).[27]

c. **The McClellan committee found top-down organizing through boycotts must be limited by legislation.** The 1959 Landrum-Griffin amendments to the Act resulted in large part[28]

[26] *Radio Officers' Union v. NLRB*, 347 US 17 (1954).

[27] There are numerous court of appeals cases reflecting this point; e.g., *Local 57, International Ladies' Garment Wkrs' U. v. NLRB*, 374 F2d 295, 301 (DC Cir 1967, Burger Circuit Judge):

> "The right to choose a union ... is a cornerstone of the National Labor Relations Act; equally protected by the Act with the right of the workers to choose that representative is the right to have none. ..."

NLRB v. Gilmore Industries, Inc., 341 F2d 240, 241 (6th Cir 1965):

> " ...[I]t must not be forgotten that the paramount purpose of the Act was to secure to the employees freedom of choice in the selection of their representatives. [citations omitted] There can be no question but that freedom of choice may be seriously interfered with by economic inducements."

Retail Clerks Union, Local 770 v. NLRB, 370 F2d 205, 208 (9th Cir 1966); *Waterbury Community Antenna, Inc. v. NLRB*, 587 F2d 90, 91 (2d Cir 1978).

[28] It was the hearings of the Select Committee which "were in large part responsible for the inclusion of the secondary boycott provisions in the ... Labor-Management Reporting and Disclosure Act of 1959" (Final Report of the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, pursuant to S. Res. 44 and 249, 86th Cong., 1960, at p. 68, and see p. 869 (hereafter "Final Report").

from the revelations of the Senate Select Committee created to investigate improper activities in labor-management relations and to determine if any changes in the law were required.[29] Headed by Senator McClellan, the committee over a two-year period held extensive hearings throughout the country. Among the practices investigated and condemned by the committee were numerous examples of "top-down" organizing of employees—where unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. The union would demand that the employer sign a contract. The contract would recognize the union and require the employees to join. If the employer refused to sign he would be picketed or boycotted—his work or his supplies would be cut off, often forcing him out of business.[30]

The Committee found "organizational picketing" had been "seriously abused" where "the wishes, desires, and interests of the employees involved as to whether they wished to be unionized were never considered" (Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, Pursuant to S. Res. 74 and 221, 85th Cong., (1959) at 447 (hereafter "Interim Report")); that union leaders "encouraged and negotiated top-down contracts—agreements . . . which resulted in forced entry of employees into a union not of their choice" (*Id* at 445); and that employer representatives were also guilty of "improper activities" in that "[t]hey have forced employees to join unions, without ascertaining sentiment on the subject, by arranging for 'top-down' contracts . . . " (*Id* at 6).

The Committee found that such top-down organizing was often accomplished through a "hot cargo" provision in the union's contract with other employers, stating they would not do business

[29]Senate Res. 74, 85th Cong., 1st Session, creating the Senate Select Committee on Improper Activities in the Labor or Management Field, January 30, 1957.

[30]Examples included: Mr. Gilbert of San Antonio, Texas testified of the union representative's demand that he sign a contract "even though he admitted that the union did not represent a majority of the employees" (Final Report, p. 7). Mr. Barry of Houston, Texas testified that when he balked at signing a contract because the union did not represent his employees, the union representative said he "didn't care what [the employees] wanted, that [the union was] signing a contract with me, not them" (*Id* at 18). Mr. Coffey of Omaha, Nebraska testified that when he pointed out that the union did not represent his employees, the union representative told him "that didn't make any difference . . . they were going to organize me from the top down" (*Id* at 25). Mr. Clarke of Omaha, Nebraska gave similar testimony (*Id* at 33); and see *Id* at p. 69.

with anyone with whom the union had a dispute. If an unorganized employer refused to sign, the union called for applying the "hot cargo" provision against him. As Senator Ervin stated, "the so-called hot-cargo agreement . . . was being utilized by the [union] as a device to coerce these [other employers into] compelling their employees to join the union" (*Id* at 46). In its final report the Select Committee concluded:

> "The use of 'hot cargo' clauses . . . has been one important method by which [the union] has continued to use secondary pressure against certain employers for the purpose of carrying on its organizational efforts with respect to other employers.
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> . . .
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> " . . . In every case heard by the committee the boycotts were used to coerce workers into joining unions which they did not want to join. . . . " (Final Report, p. 3)

The Committee's investigation included the construction industry. It found, for example, that the Sheet Metal Workers Union did not represent the employees but nevertheless sought "to force the employees to affiliate" with that union by directing "its campaign of intimidation against management" by compelling contractors to agree not to do business with an employer whose employees had elected to have a different union represent them (Final Report, pp. 60, 61). The proposal made to the committee to prevent the Sheet Metal Workers Union's conduct was to strengthen the Act "[b]y not permitting either the union or the employer to legitimatize a boycott by contract . . . " (*Id* at 62).[31]

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[31]The Committee made specific findings concerning the International Union of Operating Engineers, whose local is involved here. The Committee found that "[I]n the American labor movement the International Union of Operating Engineers stands out as an ugly example of ruthless domination of working men and women through violence, intimidation and other dictatorial practices" (Interim Report, p. 437)

The Committee elsewhere observed concerning the "construction field" generally that where "[d]ilution of the democratic processes in labor unions" is combined "with tight control of the labor supply in the particular skill involved, the potentiality for abuses associated with a monopolistic position is intensified" and contractors in unionized metropolitan areas "are disposed to avoid probable conflict with a union and refuse to accept bids from the small independents unless they have been unionized" and expressed concern for the "plight of the small independent who is faced with this dilemma [which] was graphically described during [the Committee's] hearings" (Final Report, p. 71).

Notably the general secretary-treasurer of the Sheet Metal Workers Union testified to the Committee that the "sole purpose" of the boycott agreement was to protect its members from lower wage rates.[32]

The Committee found that union top-down organizing was equally egregious when the employees had selected a different union to represent them.[33]

d. **A major aim of the Landrum-Griffin amendments was to limit top-down organizing.** As stated by this Court in *Connell*, supra:

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. ... " 421 US at 632. See also *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 346-347 (1978).

The legislative record repeatedly confirms this. A few examples will suffice: Senator Mundt (who was vice-chairman of the Select Committee) stated to the Senate subcommittee considering the legislation:

> "The primary motivating condition which makes necessary ... congressional action, is the marked lack of voluntarism in the organizing techniques of American unions today. Substantial numbers of dues paying rank and file are not in the organized labor movement as a result of their own free will and

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[32]He testified:

" ... It has ... been said that our purpose is to raid the Steelworkers and to obtain recognition for ourselves in the Burt plant.

"Nothing could be further from the truth.

"I cannot emphasize too much or too often that our sole purpose in enforcing our agreements with our contractors is for the protection of job opportunities for our members and the elimination of the unfair competition from employers, of which Burt is one, *who receive such competitive advantage from the payment of lower wage rates*" (*Id* at 66, emphasis added).

[33]For example: The barbers of Terminal Barber Shops, Inc. at the New York Waldorf-Astoria Hotel had selected the Barbers Guild to represent them, but were nonetheless forced to join the Barbers Union of the AFL-CIO, to avoid picketing (Final Report, p. 52 and see p. 69). Similarly, the employees of Burt Manufacturing Co. had selected the United Steelworkers to represent them, but the Sheet Metal Workers Union engaged with contractors in boycotts against Burt because its employees were not members of the Sheet Metal Workers (*Id* at 60, 61, 70); though see note 32, supra.

volition. An even larger number, who desire organization, have been forced into unions to which they do not choose to belong. Free employee choice is being replaced by organization from the top down. . . . "[34]

Similarly, Senator McClellan told the subcomittee:

"I think one of the most vicious things, of course, is a form of compulsion that compels people to sign their employees into a union, whether they want to or not. . . . " (Senate Hearings (1959), supra, n. 34, p. 719).

Congressman Rhodes stated in house debate:

"One of the most cherished principles in our national labor policy is the principle of freedom of choice on the part of the workers of this country. . . .

"One of the most lasting impressions I obtained from my 6 years' experience on the Committee on Education and Labor was the extent to which the widespread use of the secondary boycott had made a mockery of this basic guarantee. In essence the secondary boycott is simply a device which enables powerful union officials to intervene in the affairs of employees they do not represent and to flout the majority rule principle. And the safeguards of the secret ballot in Labor Board elections. In other words, it is a method of forcing neutral employers to put pressure on other employers to capitulate to the union despite the wishes of their own workmen" (2 Leg Hist 1580).

Senator McClellan said in Senate debate:

"[Workers] ought not to be compelled and hijacked to join unions whether they want to or not, when they are not given a free choice. Compulsion and hijacking are nothing in the world but top-down organization; and top-down organization has no place in American law or American institutions,

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[34]Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess. on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311, Bills pertaining to Labor-Management Reform, p. 731 (1959) (hereafter "Senate Hearings (1959)"). Senator Mundt went on to state: "If there is any member of this committee that doubts the existence of this compulsory condition, I direct his attention to the 40-odd volume record of the McClellan committee investigations. Case after case has been revealed where individual choice on the part of the workers was totally ignored in union organization" (*Ibid*).

> because it is a type of economic force to compel and subject people against their will." (105 Cong. Rec. 6648-6649; 2 Leg Hist 1175).

Senator Goldwater said in Senate debate:

> " . . . I do not think any Member of the Senate will disagree with the thesis that we must take some action to stop coercive picketing when the whole purpose is to organize from the top down, without the consent of the employees." (105 Cong. Rec. 6664-6665; 2 Leg Hist 1191).
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> * * * * *
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> "Some of the most shocking of the revelations of the McClellan committee involved the use of secondary boycotts and recognition and organizational picketing . . . . In all such cases the interests and desires of the employees involved as to whether they wish to be unionized were never considered." (2 Leg Hist 1437).

Extensive review of the Act's legislative record shows that no member of the Senate or House ever expressed disagreement with this fundamental policy that employees are to have the right to freely select their representative and top-down organizing is not to be tolerated.

Nor did Congress abandon this fundamental principle of free employee choice when it turned to the construction industry.

> "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry. . . ." *NLRB v. Iron Workers (Higdon Construction Co.)*, supra, 434 US 335 at 347-348 (1978).[35]

Whatever accommodations were considered appropriate for the special characteristics of the construction industry, they were limited by this fundamental concern.

Congress' aim of limiting top-down organizing is reflected in several parts of the 1959 Act. Section 8(b)(7) was added to limit recognitional and organizational picketing of the employees' own employer. Section 8(e) was added to prohibit secondary boycott agreements, which (as shown above) Congress found were a frequently-used tool for top-down organizing one employer's employees by having other employers refuse to handle his goods or otherwise to do business with him. Section 8(b)(4)(A) was amended

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[35]See e.g. 2 Leg Hist 1180 (Sen. Mundt's description of "blackmail picketing" of electrical subcontractor to force him to recognize the IBEW).

to forbid coercion of employers and to make picketing to secure such a secondary agreement an unfair labor practice (see above pp. 2-3).

e. **The special characteristics of the construction industry do not justify, nor did Congress intend they justify, the broad top-down organizing of union signatory subcontractor clauses which apply when the union's members employed by the general contractor are not even present.** There can be no doubt that special characteristics exist in the construction industry. The essential question here concerns the nature of those characteristics and how Congress dealt with them in the 1959 Act. As shown from the Congressional Record, the construction industry has two special characteristics: (1) shortness of jobs, and (2) a work situs where employees of many employers work together. Each will be discussed:

(1) **The shortness of construction jobs does not justify top-down organizing by subcontractor clauses, nor did Congress intend that it should.** With respect to short job duration, as the majority below states (654 F2d at 1309; J.A. 72), "[t]he primary characteristics which differentiate the construction industry from most others are well stated" in a 1959 Senate Report as follows:

> "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction" (S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. (1959); 1 Leg Hist 423).

The Report goes on to state that for two reasons these characteristics necessitate that labor contracts be made before a representative majority of employees is hired:

> " . . . One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. . . . " (*Id* at 424).

An identical statement was made by a House Committee Report.[38] In *Higdon*, supra, this Court referred to these same "aspects peculiar

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[38]H. Rep. No. 741, 86th Cong., 1st Sess, p. 19 (1959); 1 Leg Hist 777.

to the building trades" and observed that "Congress apparently thought [they] justified the use of pre-hire agreements with unions that did not then represent a majority of the employees" and that they were the reason for § 8(f) which the 1959 Congress added to legalize prehire agreements in the construction industry (434 US at 348).[37]

However, nowhere in the legislative history of the Act is it suggested that these needs required or justified the imposition of a labor contract on subcontractors through a group boycott or the organizing of their employees from the top down. And clearly these needs carry no such requirements. Although contractors (or subcontractors) may *voluntarily* enter prehire union contracts to know their labor costs and to have skilled workers, it does not follow that unions and general contractors may enter into agreements *requiring* subcontractors to do so. Subcontractors may already know their costs and have skilled workers without need for an agreement with this union or with any union.

Furthermore, this clause cannot be justified by the policies prompting § 8(f) because Congress intended that § 8(f) prehire agreements be *voluntary*. As this Court emphasized in *Higdon*, "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle" (434 US at 348, n. 10).[38] Under the ruling below, however, a union can force an involuntary prehire labor contract on a subcontractor by picketing the general contractors to force them to agree to boycott the subcontractor from all AGC jobs if the subcontractor fails to sign. By no stretch can this

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[37]Section 8(f) further accommodated these construction industry needs by reducing from 30 to 7 days the period permitted for requiring an employee to join the union under a union shop clause, and permitting agreements for union referrals and for certain priorities in hiring (29 USC § 158(f)).

[38]As the Court further observed in *Higdon*, Senator Kennedy explained, with the explicit "'intention . . . to establish the legislative history on this question:

"'It was not the intention of the committee to require . . . the making of prehire agreements, but, rather, to permit them; nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements' 105 Cong. Rec. 18128 (1959); 2 Leg Hist 1715." (434 US at 348, n. 10)

be called "voluntary." It cannot be justified by any legislative policies found in § 8(f)'s prehire provisions, for Congress explicitly confined them to voluntary arrangements.

The construction industry's needs for forecasting labor costs and for a source of skilled workers—which arise from the characteristic of short job duration—are satisfied by § 8(f). They are irrelevant to § 8(e) and do nothing to justify the majority's interpretation of the proviso.[39]

(2) **The existence of a common work situs does not justify top-down organizing by union signatory subcontractor clauses which apply when the union's members employed by the general contractor are not even present, nor did Congress intend that it should.** In *NLRB v. Denver,* supra, 341 US 675 (1951), the general contractor engaged a nonunion subcontractor who paid below union scale. The union told the general contractor that "union men could not work on the job with nonunion men" (341 US at 679) and picketed when the general contractor refused to terminate the subcontract. The Court held that this violated § 8(b)(4). Justice Douglas dissented, stating:

> " . . . All the union asked was that union men not be compelled to work alongside nonunion men on the same job. . . . " (341 US at 692)

The Court's ruling in *Denver* prompted strong efforts by construction unions to have Congress pass legislation to overrule it.

Congress considered such legislation in its 1959 deliberations leading to the Landrum-Griffin amendments. The efforts to overrule *Denver* failed; no provision was passed to broadly except construction unions from the Act's secondary boycott provisions.[40]

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[39]Indeed, the Senate Report quoted by the majority below was on a legislative proposal that did not even contain a hot cargo or secondary boycott provision, much less any construction industry exception to it. The proposal's only provision concerning the construction industry was a forerunner to § 8(f). (1 Leg Hist 423).

The identical statement in the House Report was also made with explicit reference to the forerunner to § 8(f). It was on H.R. 8342 which did contain the additional construction industry proposal to overrule *Denver,* supra by permitting picketing of an entire jobsite based on a dispute with any contractor on the site. However, the asserted justification for that provision was separately stated and had nothing to do with forecasting labor costs or securing skilled workers (see H. Rep. No. 741, p. 21; 2 Leg Hist 778-781).

[40]The key concession obtained by the advocates of overruling *Denver* was "a commitment from the leadership of the House and Senate" that in January, 1960 a

However, as *Connell* observes, the construction proviso "seems . . . to have been adopted as a partial substitute for [that] attempt" (421 US at 629), so the legislative concerns expressed about *Denver* are instructive to show the concern of the proviso. During the 1959 debates, two such concerns were repeatedly stated: (1) that it could allow union wage standards to be undermined; (2) that it could force union workers to work "side by side" with nonunion workers. As shown below, neither concern can justify a broad union signatory subcontractor clause like this.

(a) **The first concern expressed in the 1959 Congress as a reason for overruling *Denver*—maintaining union wages and benefits—cannot justify this union signatory clause which excludes nonunion subcontractors even though they pay more than union wages and benefits.** In *Denver* the nonunion subcontractor paid wages substantially below union scale. During the 1959 debates opponents of *Denver* argued that that decision deprived construction unions of the power to limit such subcontracting, and that therefore union workers could be forced to work side by side with workers paid at subunion rates. For these reasons, it was urged that construction unions should be exempt from the prohibition against secondary boycotts (thus overruling *Denver*).

Senator Morse, a member of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, a member of the Conference Committee, and a consistent advocate for overruling *Denver*, described *Denver* as a case that " . . . involved an electrical subcontractor paying 42 cents an hour below the negotiated area rate" and argued it should be overruled (105 Cong. Rec. 17881, 2 Leg Hist 1425). That Senator Morse perceived the secondary boycott as essentially a means for unions to protect their wage standards, is illustrated by his comments during hearings of the Senate Labor Subcommittee:

> " . . . [W]orking conditions in one economic environment for some determines in no small measure the working conditions that are going to be available for the others.
>
> "I think that is the hottest of all the issues before us in this legislation, the secondary boycott issue.
>
> * * * * *

situs picketing bill "will come to the floors of the House and Senate" (2 Leg Hist 1434, remarks of Sen. Kennedy). It was this future bill, which had been assured prompt consideration by both houses, not the construction industry proviso, that these advocates saw as the vehicle for achieving their aims.

> "[N]o self-respecting union man or woman is going to knowingly be a party, to help maintain low labor standards in the plant across the street or in the next town." (Senate Hearings (1959), supra, note 34, at p. 356).

Senator Morse' argument that a bill overruling *Denver* was necessary to allow unions to protect their wage standards was repeated by Senator Carroll:

> " ... The Denver case involved members of a craft union working on a big building. An electrical company, paying 42 cents an hour under the prevailing wage received a subcontract. The building trade workers—carpenters, bricklayers, and the rest—said, 'We refuse to work alongside them.' That was the basic issue involved ...
>
> "... The company had men who were working for 42 cents an hour under the wage scale." (2 Leg Hist 1436)

The view that overruling *Denver* was necessary to protect union wage standards in the construction industry was also prevalent in the House. Representative Thompson, a member of the House Committee on Education and Labor and a House conferee, and Representative Udall, also a member of the Committee on Education and Labor, presented a memorandum favoring overruling *Denver* during the debates that preceded the House's adoption of the Landrum-Griffin bill. They said:

> " ... [Construction workers] *work side by side and the wages and working conditions of one trade affect all the others*. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refused to work on nonunion doors made in Minnesota by the men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment." (2 Leg Hist 1577, 1588, emphasis added)

Thus, in Thompson's and Udall's view the purpose of overruling *Denver* was to allow unions to protect their wage standards from the threat posed by workers on the same job paid at lower rates.

That the concern for protecting union standards prompted the proviso to § 8(e) is shown from the debates on the Landrum-Griffin bill when it prohibited all secondary agreements without exception. During the House floor debates Representative Roosevelt, a member of the House Committee on Education and Labor, opposed the bill and stated that under it "an agreement, which is made for the

purpose of maintaining fair standards in an industry and which is in accord with the basic principles of honorable trade union philosophy, would become in itself an unfair labor practice" (105 Cong. Rec. 14220; 2 Leg Hist 1593). Senator Morse noted that under Landrum-Griffin prior to the addition of the proviso to § 8(e) "[a]n agreement requiring subcontracted work to be performed under certain wage conditions would be illegal" (105 Cong. Rec. 16399; 2 Leg Hist 1428). Senator Kennedy also viewed a general ban on hot cargo agreements as outlawing union standards agreements. In opposing such a ban he said:

> " . . . I believe it is in the public interest for employers and unions to agree not to do business with employers who pay substandard wages and maintain substandard working conditions. . . . " (2 Leg Hist 1195)

The proposed hot cargo ban, Kennedy said, would "make it impossible for decent employers and employees to protect their standards in vital industries. *This is an economic issue.* . . . It is a question of legitimate activity *to protect reasonable wages*" (2 Leg Hist 1195, emphasis added.)[41]

When Congress enacted § 8(e), union standards clauses—requiring subcontractors to meet union economic standards—were considered secondary; thus, union standards clauses could be legalized in the construction industry only by an exception to § 8(e). The concept that union standards clauses are primary (and therefore not within § 8(e)'s prohibition) had not yet developed. Indeed, until 1966 the Board held union standards clauses prohibited by § 8(e).[42]

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[41]Similarly Senator Humphrey condemned a broad prohibition on secondary boycotts since it would preclude boycotts of companies "paying substandard wages which are depressing and undermining the union standards throughout the industry. The sweatshop employer, no less than any other, in present law is protected" (2 Leg Hist 1037).

[42]E.g., *Meat and Highway Drivers, Etc., Local No. 710 (Wilson & Co.)*, 143 NLRB 1221, 53 LRRM 1475 (1963), enf'd in part, set aside in part and remanded in part, 335 F2d 709 (DC Cir 1964); *Truck Drivers Union Local No. 413 IBTCWHA (Patton Warehouse, Inc.)*, 140 NLRB 1474, 52 LRRM 1252 (1963), enf'd in part 334 F2d 539 (DC Cir 1964) cert. den. 379 US 916 (1964). In *Wilson* the subcontractor clause permitted "subcontracting to any company 'whose truckdrivers enjoy the same or better wages and benefits' as set forth in the contract" (143 NLRB at 1230, 53 LRRM at 1478). The union argued "that the clause does not sanction a secondary boycott against nonunion employers, but that it was designed to protect work for the employees in the bargaining unit by

It then reversed itself and labeled them "primary" and so not within § 8(e)'s proscription.[43] This rule has been accepted by several circuit courts[44] but has not yet been reviewed by this Court.

Clearly this union *signatory* clause cannot be justified by a need to maintain union standards. For union standards can be maintained by a union standards clause requiring subcontractors to pay wages and benefits equivalent to those paid under the union's contract. The added requirement imposed by a signatory clause — compulsory union representation — contributes nothing to the protection of union standards and serves only to organize the subcontractor's employees from the top down.

(b) **The second concern expressed in the 1959 Congress as a reason for overruling *Denver* — preventing jobsite friction between union and nonunion workers—cannot justify this broad subcontractor clause that applies even when there is no possibility of such friction.** The second concern was that of Justice Douglas in his *Denver* dissent—"union men should not be compelled to work alongside nonunion men on the same job" (341 US at 692). Douglas' dissent was quoted with approval by the House Committee on Education and Labor when it favorably reported on the Elliott Bill which would have overruled *Denver* (1 Leg Hist 687, 846). Legislators arguing to overrule *Denver* emphasized that the construction industry is unlike most others because employees of many different employers are employed together, working *side by side*. Representatives Thompson and Udall in a memorandum

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removing the economic incentive for subcontracting work to cartage companies who because of the lower wages and labor standards could perform the work cheaper" *(Ibid)*. The Board held "We see no merit in this argument" *(Ibid)*.

[43] *Highway Truck Drivers and Helpers, Local 107 (S & E McCormick, Inc.)*, 159 NLRB 84, 62 LRRM 1224 (1966), vacated and remanded sub nom *A. Duie Pyle, Inc. v. NLRB*, 383 F2d 772 (3rd Cir 1967), cert. den. 390 US 905 (1968). The Board's reversal followed decisions of the District of Columbia Circuit in *Orange Belt District Council v. NLRB*, 328 F2d 534 (DC Cir 1964), *Truck Drivers Union Local No. 413, Etc.(Patton Warehouse) v. NLRB*, supra, 334 F2d 539 (DC Cir 1964) cert. den. 379 US 916 (1964); and *Meat and Highway Drivers, Dockmen, Etc., Local v. NLRB (Wilson & Co.)*, supra, 335 F2d 709 (DC Cir 1964). In *McCormick*, the Board said:

> "We have since reconsidered our decision in the light of the court's reasoning and we now conclude in agreement with the court that the clause is primary, and thus not violative of Section 8(e)." (159 NLRB at 101-102, 62 LRRM at 1228.

[44] *NLRB v. Joint Council of Teamsters No. 38, 338 F2d 23, 28, 31 (9th Cir 1964)*.

urging passage of the Elliott Bill's provision to "overrule *NLRB v. Denver Bldg. Constr. Trades Council*" argued that construction is unique because the workers "work side by side" on "the same project" (105 Cong. Rec. 15541, 2 Leg Hist 1577). In a memorandum supporting the same provision Representative Elliott argued that "[W]here all the men ... on the same project ... work side by side" they have a special community of interest that distinguishes the construction industry (105 Cong. Rec. 15551-15552, 2 Leg Hist 1588). When the Senate failed to overrule *Denver,* Senator Carroll objected and said of *Denver:* "The building trade workers'—carpenters, bricklayers and the rest—said, 'We refuse to work alongside them [the nonunion workers].' That was the basic issue involved ... " (2 Leg Hist 1436). The construction proviso to § 8(e) was subsequently added in conference as a "partial substitute" (*Connell,* 421 US at 629) for overruling *Denver.* Thus, "There is little doubt that when Congress enacted the construction industry proviso to section 8(e), it was influenced by Justice Douglas' dissent in *Denver Building.*"[45]

As Congress recognized, it is not just the existence of subcontracting, but the side-by-side relationship that distinguishes the construction industry. For it is common in manufacturing industries for the fabrication of many components of the final product to be subcontracted. To the extent no such side-by-side relation exists, subcontracting in construction is no different than in other industries.[46]

The side-by-side relationship consistently appears in the history of the Act as the vital distinguishing trait of the construction industry. There is not even a suggestion that a construction union should have a special right divorced from that relationship, or that the mere fact that a general contractor's union employee has worked

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[45]Comment, The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott, 45 Cornell L. Q. 724, 753 (1960).

[46]Nor is there anything in the Congressional Record that suggests that the construction industry is unique merely because employees of different employers work on the same product. Small products are frequently moved from one employer's premises to another's and have employees of various employers perform work upon them; this is no justification for requiring all employees working on the product to be unionized. The critical distinction is that construction employees of different employers may be working on the product at the same time side by side, not that they may be working on the same product which is located at the same site.

at some time on a job should give the union a license to require employees of all subcontractors working at any time on the job to be union.

It is significant that on both occasions when this Court considered the construction proviso it described it as a measure allowing agreements relating to activities "on the construction site because of the close community of interests there" (*Connell*, supra, 421 US at 630; *Woodwork*, supra, 386 US at 638-639). When a union represents none of the contractor's employees who are present on a construction site, it is simply not a part of the "close community of interests" on that site. When a union, like Local 701 here, which is a stranger to that close community attempts to dictate the labor relations policies of the subcontractors on that site and to force itself upon the employees at that site as their bargaining representative, that union acts far in excess of what was contemplated by this Court in *Connell* and *Woodwork*.

Clearly the concern for jobsite friction cannot justify this broad clause, for it applies when no union members employed by the general contractor are even on the job so that no such union-nonunion friction is even possible.

In sum, Congressional concern in the construction industry was focused on jobsites where union members employed by general contractors worked "side-by-side" with subcontractors' employees, and where union standards and union jobs were at risk if subcontractors can undercut union rates. These concerns were accommodated by the construction proviso. A top-down organizing clause such as this which goes beyond these justifications, goes beyond the proviso.

B. The rulings below contain many errors.

1. **The Board erred in holding that the purpose of the proviso is irrelevant to clauses in a "collective bargaining relationship."** The Board held that Congressional policies underlying the proviso are relevant only to clauses outside a "collective bargaining relationship" (*Woelke & Romero*, supra, 239 NLRB at 248). This is clearly erroneous. Nothing in the "familiar rule"[47] of following legislative intent suggests that it is to be followed only some of the time. Nothing in *Connell*, which applied that "familiar rule" to the construction proviso, suggests that the proviso is to be applied

[47] *Connell*, 421 US at 628, quoting from *Church of the Holy Trinity v. United States*, 143 US 457, 459 (1892).

according to its purpose only sometimes and that other times it is to be applied literally, with no heed to its purpose. The Board's analysis and its ruling simply cannot be reconciled with *Connell*.

2. **The *en banc* majority erred in concluding the legislative history supports this top-down organizing clause simply because it is in a "collective bargaining relationship."** The majority does not expressly disregard Congressional policies, as did the Board, but instead looked at legislative history; yet its conclusion contains the same error. For the majority points to nothing in that history to support the conclusion that the legality of subcontractor clauses is to be determined by whether a "collective bargaining relationship" exists, and its brief review of that history omits Congress' "major aim" of limiting top-down organizing.

3. **The effect of this clause is identical to the illegal *Connell* clause whenever Local 701's members employed by the general contractor are not present.** The actual source of the majority's ruling is not found in the legislative history at all, but in the majority's erroneous interpretation of *Connell*. As previously noted, *Connell* held a virtually identical clause to be outside proviso protection. In *Connell* however, the general contractor employed none of the union's members so there was no "collective bargaining relationship." Stripped of its lengthy garb the simple holding of the majority is that *Connell* applies only to its narrow facts: such clauses are invalid under facts just like *Connell's* but otherwise are valid.

But neither common sense nor *Connell's* analysis supports such a rule. The effect of this clause on all jobs where none of Local 701's members employed by the general contractor are present is identical to the effect of the clause in *Connell:* there is the identical top-down organizing and no justification based on avoiding jobsite friction. *Connell's* analysis consisted of evaluating Congress' policies of limiting top-down organizing and avoiding problems on construction sites where there is a close community of interest. The clause in *Connell* was tested by those policies and found wanting. By the same test this clause is equally wanting except when Local 701's members are present.

According to the rule of the majority (and of the Board), if Connell had employed just one member of Local 100 for some time on one job and Local 100 had placed the same clause in a full-blown labor contract covering that one member, then the clause would have been lawful and could apply at all times to all jobs. Yet the effect of

the clause on all jobs when none of Local 100's members were working there would be indistinguishable from the effect of the clause condemned in *Connell:* an "almost unlimited organizational weapon" (421 US at 631) to organize subcontractors' employees from the top down although they have no contact with Local 100's members.

4. **The tenuous nature of a "collective bargaining relationship" in the construction industry cannot justify broad top-down organizing of subcontractors' employees by a group boycott.** The error below is emphasized by examining the nature of a "collective bargaining relationship" in the construction industry. A general contractor may only occasionally employ a member of the union, but as long as he has signed a labor contract he is said to have a "collective bargaining relationship" with the union. Furthermore, the Board has held that even though a contractor employs *none* of the union's members on *any* job, there is a "collective bargaining relationship" with a union that seeks a labor contract to cover future employees whom the union may not even represent.[48]

The rubric "collective bargaining relationship" thus labels the most tenuous of connections between an employer and a union. The extensive use of the phrase by the Board and majority below is seriously misleading if it is understood to mean anything more. As too often occurs, a high-blown phrase acquires an unwarranted stature of its own if we do not discern its real meaning. The phrase "collective bargaining relationship" in the construction industry means no more than that a union need only claim to represent one of the contractor's present or future employees on some job somewhere. Under the ruling below this licenses a broad signatory subcontractor clause that organizes subcontractors' employees at all times on all of the contractor's jobs regardless of their wishes.

5. **The majority's reasoning that this subcontractor clause is justified by "peculiarities" of the construction industry is unsound.** As shown above,[49] short job duration (which the majority says is the industry's "primary" differentiating characteristic (654 F2d at 1309; J.A. 72)) and the resulting needs to forecast labor costs and to have a source of skilled workers, were accommodated by

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[48] *Bldg. & Constr. Trades Council (Schriver, Inc.),* 239 NLRB 264 (1978), aff'd *sub nom Donald Shriver, Inc. v. NLRB,* 635 F2d 859 (DC Cir 1980), cert. den., ___ US ___ (1981).

[49] See above, pp. 27-30.

adding § 8(f) and clearly carry no requirement to top-down organize subcontractors' employees.[50]

The core of the majority's reasoning—and also the nub of its error—is its assertion that in the construction industry such signatory subcontractor clauses are needed to protect union standards. The majority finds the restraints of this clause justified by the union's need for "maintaining wage levels [and] protecting benefits" (654 F2d at 1316; J.A. 87). The majority reasons that because of the close proximity of jobsite employees the "working conditions applicable to one set of workers may very well affect others working on the same project" and, therefore (the majority holds), protecting these interests outweighs the evils of top-down organizing and secondary boycotts (654 F2d at 1317-1318; J.A. 89).

But the majority overlooks that these interests can be protected just as effectively by a "union standards" clause, which requires all subcontractors to adhere to union standards. Such clauses are lawful and, because they are primary, are not prohibited by § 8(e) and require no proviso protection. Because union standards clauses do not require the subcontractor to sign a union contract, the rights of free choice of the subcontractor's employees (which was a "major aim" of Congress) are fully preserved at the same time that the union's standards are protected. As stated by the dissenters below:

> " . . . This problem, however, is resolved by a common, primary, restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. . . . " (654 F2d 1328; J.A. 109).

6. The "bare references" in the legislative history to avoiding "serious damage" to the pattern of bargaining and preserving existing law do not warrant approval of a top-down organizational weapon which is inimical to the basic purpose of the Act.

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[50] In *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335 (1978), this Court analyzed "aspects peculiar to the building trades" perceived by the 1959 Congress (434 US at 348), a list nearly identical to this. In stark contrast to the majority below, however, *Higdon* concluded that Congress' perception of these characteristics did *not* evidence an intent to tolerate top-down organizing; on the contrary, *Higdon* stressed that "Congressional concern about coerced designations of bargaining agents did not evaporate as the focus turned to the construction industry" (434 US at 347-348).

The majority relies heavily on what it calls "legislative discussion" of the proviso (654 F2d at 1312; J.A. 78). It consists of just three statements in the entire legislative history, two by Senator Kennedy and one by the Conference Committee.[51] Analysis of both the statements themselves and their context shows that the majority's reliance is seriously misplaced for many reasons:

a. ***Connell* considered and dismissed these very legislative statements.** The majority's reliance on these statements cannot be squared with *Connell*. The parties in *Connell* presented this Court with the identical legislative statements which form the basis for the ruling of the majority,[52] but this Court rejected these statements as a basis for applying the construction proviso. Instead this Court summarily dismissed the industry pattern remarks as "bare references" (421 US at 628). The *Connell* opinion also cites (421 US at 629, n. 8) the very legislative statements concerning preservation of existing law on which the majority places such emphasis, yet *Connell* made no inquiry into the state of the law in 1959, nor made any reference to any Congressional intent to preserve such law, nor even suggested that such a line of inquiry bears any relevance to the meaning of the proviso. Instead the Court tested the subcontractor clause before it against the Congressional policies of limiting top-down organizing, the close community of interests on the jobsite, and the proviso's objective of avoiding jobsite friction—and *not* by the test used by the majority (in this part of its opinion) of whether "some such agreements existed [in 1959]" (654 F2d at 1314; J.A. 82).

b. **These statements about preserving existing law do not describe the proper scope of the proviso, which is the issue here.** These statements do not even address the issue before this Court of the *scope* of the proviso. The statements say there is no intent to

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[51]The statements consist of Senator Kennedy's comment that the garment and construction provisos were to "avoid serious damage to the pattern of collective bargaining in these industries" (105 Cong. Rec. 17899, 2 Leg Hist 1432); a statement by the Committee that it does not intend to change the law concerning agreements "relating to work to be done at the site of the construction" and "To the extent that such agreements are legal today under Section 8(b)(4) . . . , the proviso would prevent such legality from being affected by section 8(e)" (H.R. Rep. No. 1147, 86 Cong., 1st Sess. 39; 1 Leg Hist 943); and a similar statement by Senator Kennedy who adds that at least some such agreements "appear to be legal today" (105 Cong. Rec. 17900; 2 Leg Hist 1433).

[52]Pet br in *Connell* 37-38, 41-42; Resp br in *Connell* 24-25 and note 5.

change the present law with respect to clauses which are *within* the scope of the proviso; but they *do not say what that scope is*. And *that* is the issue here. The statements only repeat the identical words of the proviso.[53] They purport to define the scope of the proviso by its own terms, by a tautological repetition of the statutory language, and thus they contribute nothing to the inquiry. As stated by the dissent below:

> " . . . [T]he most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about." (654 F2d 1327; J.A. 107).

c. **The intention of these statements did not encompass the licensing of broad top-down organizing when no countervailing policy is served.** These statements do not even purport to address the question here of whether the union's members must be present to justify a requirement that subcontractors' employees also be union members. The statements are broad and, like the statute, "must be interpreted in light of [their] setting" (*Connell*, 421 US at 628). A "major aim" was to limit top-down organizing. Although the construction industry was accommodated to avoid jobsite friction and prevent destruction of union standards, this clause goes beyond those accommodating and is contrary to that major aim. These brief statements cannot reasonably be said to intend such a broad license.

d. **The majority's interpretation of these statements would hold lawful the clause condemned by *Connell*.** By the majority's test (at this point in its opinion) of whether "some such agreements existed [in 1959]" (654 F2d at 1314; J.A. 82), the clause in *Connell* would have been lawful. As observed by the Board's General Counsel (and contrary to the majority's assumption, see 654 F2d at 1318 n. 32; J.A. 90, n. 32), *Connell*-type subcontractor clauses "containing little more than subcontracting provisions" and "not [in a] conventional collective bargaining relationship" were "commonplace" in 1959 (1974 Labor Relations Yearbook (BNA 1975) 298, 307). If, as the majority would have it, the proviso preserved

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[53]The proviso's language states that the scope of its exception is agreements "relating to . . . work to be done at the site of the construction" project. Both the Committee and Senator Kennedy's statements use words identical to the proviso itself, saying the law is unchanged with respect to agreements "relating to work to be done at the site of the construction" project.

preserved the legality of all clauses that existed in 1959, it would clearly have preserved the legality of the commonplace "stranger" signatory clause condemned in *Connell*.

Despite its reliance on the preservation of existing law remarks, the majority does not even consider the legality in 1959 of *Connell*-type clauses. In fact, the case law as of 1959 relied on by the majority contains no suggestion that the legality of any hot cargo clause would in any way be affected by the presence or absence of a "collective bargaining relationship."[84] Since the majority's reasoning would legalize the clause in *Connell*, it is clearly inconsistent with that case.

e. **The legality of such subcontractor clauses had not yet been evaluated or clearly determined in 1959.** The majority's use of these legislative statements is further in error because it assumes that such subcontractor clauses were lawful in 1959—so (the majority reasons) the law with respect to them remained unchanged after the amendments. However, as emphasized by the dissent below, "the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959" (654 F2d at 1327; J.A. 107).

The majority asserts that it "seems more likely than not" that such agreements were lawful (654 F2d at 1313; J.A. 80), but the only cases it cites are *Operating Engineers Local Union No. 3 v. NLRB (Northern California)*, supra, 266 F2d 265 (DC Cir 1959), cert. den. *sub nom St. Maurice v. NLRB*, 361 US 834 (1959), and *Sand Door*, supra, 357 US 93 (1958).

The majority's discussion of *Northern California* neglects to mention that the case was not decided under § 8(b)(4), the secondary boycott statute; instead it was decided under §§ 8(b)(1) and (2) and 8(a)(l), (2) and (3). The Conference Committee statement on which the Court relies purports to preserve certain secondary agreements "to the extent that such agreements are legal today *under § 8(b)(4)*" (1 Leg Hist 943, emphasis added). Since *Northern California* was not decided under that statute, the very legislative source which forms the basis of the majority's argument shows the irrelevance of that case. It also bears noting that *Northern California* hardly

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[84] *Sand Door*, supra, 357 US 93; *Truck Drivers and Helpers Local Union No. 728 (Genuine Parts Co.)*, 119 NLRB 399 (1957); *Northern California Chapter*, 119 NLRB 1026 (1957), aff'd 266 F2d 265 (DC Cir 1959), cert. den. in part and rev'd in part 361 US 834 (1959).

presented the type of legal landmark that Congress might wish to preserve; there was a split among the three Board members who voted in favor of the clause and a strong dissent from the remaining two members. Furthermore, the union's concern in that case was the undercutting of union standards, and both union and nonunion employees were working side by side on the job;[55] it did not even address the issue here of a union signatory effort unconfined to union standards and applying when no union member is employed by the comtractor present.

Equally misplaced is the majority's reliance on *Sand Door.*[56] In that case this Court said, "There is no occasion to consider the invalidity of hot cargo provisions as such" (357 US at 107) and while the Court noted that "voluntary observance of a hot cargo provision by an employer" was permissible (357 US at 108), the opinion strongly implies that there was no legal remedy against an employer who breached a hot cargo clause. The Court said:

> " . . . [T]he freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. . . . " (357 US at 105).

This "freedom of choice," the Court stressed, "must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties" (357 US at 105). The Court's solicitude for the employer's freedom of choice raises serious doubt whether an employer's refusal to abide by a hot cargo clause could subject him to any claim for damages or other relief. If an employer who was faced with a subcontracting decision knew that a subcontract to a nonsignatory firm would subject him to liability for the pay that all of the union workers would have received had he chosen the signatory contractor, the economic

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[55] "[T]he Union protested . . . referring specifically to . . . pay scales, working conditions, and [fringe benefit] payments" 119 NLRB at 1036. The triggering element of the work stoppage was that a subcontractor's employees who were not members of the union "had no objection to working alongside" the union's members (119 NLRB at 1030), but the union's members on the project objected and stopped work. Even under these facts two Board members "Regard[ed] the subcontractor's clause as intrinsically illegal" (119 NLRB at 1035).

[56] *Local 1976, U. B. C. & J. v. NLRB (Sand Door)*, 357 US 93 (1958). *Sand Door* held that hot cargo agreements were no defense to a union's inducement of secondary employees to engage in a strike in violation of § 8(b)(4).

pressure to choose the signatory contractor would be overwhelming. Such an employer would not have the "freedom of choice . . . notwithstanding any private agreement entered into between the parties" which *Sand Door* requires. Furthermore, if that coercive agreement is forced on the employer by a strike (as the majority below permits), the "freedom of choice" evaporates completely.

Thus, while *Sand Door* did not hold hot cargo clauses to be illegal, it cast serious doubt on their enforceability. The line between an illegal agreement and an unenforceable one is a thin one—a distinction not likely to be observed with precision in the give and take of legislative debate.

The impact of *Sand Door* on the enforceability of hot cargo clauses did not escape the attention of Congress. Senator Goldwater[57] submitted a statement to the joint subcommittee on labor-management reform legislation of the House Committee on Education and Labor stating that there is "danger that by acting in this field we may overrule existing decisions which outlaw hot cargo type of agreements."[58] When asked during his testimony before the joint committee what he meant by "existing decisions," the Senator replied: "We have a decision of the Supreme Court on that. It is a Supreme Court decision that says a hot cargo clause outside the transportation industry cannot be enforced. This [proposed legislation] might upset that" (*Ibid*). Thus, Senator Goldwater's view of "existing law" was that hot cargo contracts were unenforceable and he used the notion of unenforceability interchangeably with illegality. Similarly, the view was expressed in the House that under existing law "hot-cargo contracts are unenforcible [sic]" (2 Leg Hist 1620, remarks of Rep. Cramer).

In sum, at the time the LMRDA was enacted the legality of hot cargo clauses under § 8(b)(4) was an open question, under other sections of the Act a clause had been upheld in a context concerned with union standards and where the union and nonunion employees worked side by side, but only by a narrow majority of the Board and

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[57]Senator Goldwater was a member of the McClellan Committee, a member of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, and a conferee.

[58]4 Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation (1959), p. 1647 (hereafter "House Hearings").

in the face of a strong dissent, and there was strong doubt that there was any remedy for breach of such a clause. Thus, the 1959 law of hot cargo clauses would provide the murkiest of guideposts to the meaning of the proviso; in addition, such a test for proviso legality would be wholly insensitive to the purposes of the proviso and to the circumstances surrounding its enactment. This again confirms the wisdom of *Connell's* dismissal of the "preservation of existing law" remarks as a basis for determining the scope of the proviso.

f. **There is no reasonable basis for claiming that Congress assumed that clauses functioning like this one were lawful or intended them to continue to be so.** The lack of any clear determination of the legality of such clauses in 1959 cannot be overcome—as the majority below seems to suggest—by arguing that Congress assumed clauses like this lawful and intended that they continue to be so.

In an apparent attempt to show that Congress perceived signatory subcontractor clauses to be legal under "existing law" the majority below states that a House subcommittee was made aware of *Northern California*, supra, (654 F2d at 1313, n. 22; J.A. 80). Although it is true that a copy of that decision was filed with the subcommittee (2 House Hearings, supra, n. 58, at 804) the case was there described as a "decision that makes it clear that the union and the employer had *violated the unfair labor practice section* of the Taft-Hartley Act" (*Ibid*, emphasis added). The decision had been previously brought to the attention of a three-person panel of the subcommittee where its labor consultant indicated that the court had upheld a subcontracting agreement, but also stated that the Board had "split three ways on the question" of whether "the subcontractor clause was legal," that "[t]wo members felt that the contract was not legal; two members felt that it was legal [and] [t]he third member was some place in between" (5 House Hearings, supra, n. 58, at 2368). Representative Roosevelt responded:

> "Obviously, Mr. Chairman, there seems to be confusion as to whether this is a legal thing, or not. My own opinion would be that this is obviously an unfair labor practice and should be so ruled." (*Ibid*).

Representative Hiestand then observed:

> " . . . I am prone to agree with my colleague that this is an unfair labor practice, but that if there is any question and the courts have any doubt about it, it is obviously the responsibil-

> ity of the committee to write and correct the law so that there can be no such incident recur. This is a manifest injustice." (*Id* at 2369).

To which Representative Roosevelt replied:

> "I just want to say I concur with Mr. Hiestand." (*Ibid*).

No one said otherwise.

This record, cited only in part by the majority, is directly contrary to the notion that Congress thought such clauses lawful and to the notion that it intended to continue them so. By no stretch can these isolated events in a voluminous record support a claim (as suggested by the majority) of Congressional awareness, much less a stamp of approval, of broad subcontractor clauses used as top-down organizational weapons.

g. **Congress did not intend to license any and all forms of broad subcontractor clauses simply because "some" such clause existed in 1959.** The majority relies on a survey by Leon E. Lunden to show that a pattern of bargaining existed in 1959, which (according to the majority) Congress intended to preserve (654 F2d at 1313, J.A. 81-82). But the Lunden study is of no value here since it fails to distinguish union standards clauses, union signatory clauses, and clauses placing other restrictions on subcontracting. The Board's General Counsel found the Lunden study "inconclusive"[59] and so made his own study, which found union signatory clauses of any form in only eight (fewer than twelve percent) of the contracts examined, and which concluded that there was no consistent pattern in 1959.[60]

The majority reasons that it is sufficient if "some such agreements existed" in 1959 for all construction unions to be free to

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[59]General Counsel's Memorandum, December 15, 1976, 93 Lab Rel Reporter 390, 404, reprinted in 1976 Lab Rel Yearbook 295, 309.

[60]The General Counsel stated:

> " ... The only 'pattern' that does emerge is that of a mosaic, i.e., many different practices that vary with the union, and the geographic area involved. To say that Congress intended to preserve this 'mosaic pattern' would lead to the conclusion that the legality of a 'particular union' subcontracting clause today depends on whether the signatory union in the particular geographic area had such a clause in 1959. Absent express statutory language or clearly compelling legislative history, one would not infer that Congress intended to have different 8(e) results for different geographic areas and different construction unions, depending upon practices that existed 17 years ago." (93 Lab Rel Reporter at 394-395, 1976 Lab Rel Yearbook at 309).

top-down organize (654 F2d at 1314; J.A. 82). Thus, by the logic of the court below, the mere existence of a handful of such clauses in 1959 constitutes a "pattern" which licenses construction unions nationwide to engage in broad top-down organizing in defiance of the major aim of the 1959 Act.

The limited and sketchy evidence of 1959 subcontracting restrictions demonstrates the wisdom of the *Connell* Court in eschewing this as a basis for construing the construction proviso. The interpretation of this important statute should rest not on patchy evidence relating to legislative statements growing out of an eleventh hour compromise to rescue a faltering labor reform bill, but should instead rest on the basic values and goals embodied in that legislation.[61]

h. **Mechanical application of the pat verbal formulae of preserving 1959 conditions is inconsistent with the rule of *Connell* and *Woodwork* that the proviso is to be applied in light of the statutory setting and the circumstances surrounding its enactment.** This Court has cautioned against rigid adherence to the letter of a statute and observed that this principle "has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views . . . ' " *Woodwork*, supra, 386 US at 619. This language is particularly apt here. The secondary boycott provisions were the most controversial and were the last and most difficult to be resolved in conference (2 Leg Hist 1375).[62] Since the fate of the entire Act was hanging in the balance, the pressure on the conferees to resolve this final impasse was substantial; it is not surprising, then, that the resolution of the

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[61]The majority's view finds scarce support even in Senator Kennedy's comment — which is the majority's sole cited support on the point — about avoiding "serious damage" to existing bargaining. Merely because "some" unions may have had top-down organizing clauses in 1959, it does no "serious damage" to the construction industry's pattern of bargaining to limit their top-down organizing impact to those circumstances which Congress considered needing accommodation. There is no indication that just because "some" top-down organizing clauses existed in 1959, Congress intended to license any and all similar clauses.

[62]Senator Dirksen, a conferee, reported to the Senate while the Conference Committee was still in progress, that agreement had been reached on the first six titles to the bills. Only title 7 remained and in that title "Our major difficulty, however, Mr. President, is in the field of secondary boycotts" (2 Leg Hist 1375).

deadlock was described by the Conference Committee in terms of such breadth and generality, including defining its scope by its own terms, that each faction could find support for its position. Thus, for example, two conferees (Senator McNamara and Representative Thompson) thought that the construction proviso allowed a union and a contractor to agree that the contractor would not install materials fabricated in a nonunion shop (2 Leg Hist 1815, 1816); other conferees disagreed, as have the Board and the courts. Senator Kennedy may have thought that the proviso might permit some form of union signatory subcontractor clauses, although the record does not show any consideration of the precise point. But, given the strongly held opposing views on boycotts, resulting in an impasse among the conferees, given the conferees' use of broad and ambiguous language as one means of achieving compromise, and given that, as a last-minute addition to the Act, the proviso was not a subject of any committee hearings or reports to more specifically elucidate its meaning and there was little time for legislators to acquaint themselves with it, the necessity for "reconstitut[ing] the gamut of values current at the time" (*Woodwork*, supra, 386 US at 620) in order to effectuate the intent of the legislature as a whole is especially acute for this statute. It would be wholly inconsistent with *Woodwork* and with *Connell's* admonition that the proviso must be viewed "in light of the statutory setting and the circumstances surrounding its enactment" (421 US at 628), to resolve the present controversy based on a mechanical inquiry into 1959 practices or 1959 law.

7. **The majority's reliance on § 8(b)(7) is in error.** The majority below seeks to distinguish *Connell* on the ground it is a narrow ruling which merely fills a "gap" in § 8(b)(7). The majority reasons that, since the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited by § 8(b)(7), so would have been unlimited if the subcontractor clause had not been found outside the construction proviso. The majority reasons that "[t]he situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation the union's coercive force is limited" (654 F2d at 1321; J.A. 95).

This is wrong. A union which seeks a subcontractor clause in the context of a "collective bargaining relationship" can exert the same unlimited coercive force which *Connell* found unlawful. If the union

represents the employer's employees, it can, under the majority's rule below, refuse to sign a contract unless it has a signatory subcontractor clause and can picket indefinitely to secure such a clause without violating § 8(b)(7) or any other provision. The majority asserts that "the employer may resist any such attempts . . . by asserting its own bargaining position and presenting its own demands" (654 F2d at 1321; J.A. 95); the same unrealistic argument could be made concerning a union demand for a hot cargo clause in any industry, but Congress found it unacceptable and adopted § 8(e). Furthermore, even if the union does not represent the employer's employees, it can engage in "informational" picketing to publicize the fact that the employer has no contract with the union without violating § 8(b)(7) or any other provision, and can do so indefinitely, under the majority's rule, until the employer signs a contract containing this subcontractor clause.[63]

8. **The majority's argument of "immense practical problems" is baseless.** The majority asserts that only a rule permitting broad signatory subcontracting clauses is practical, and that "[l]imitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems" (654 F2d at 1321; J.A. 97). This is baseless.[64]

The majority suggests that subcontracting agreements limited to sites where union employees are present (and where union-nonunion friction can therefore occur) may require separate negotiation for each jobsite (654 F2d at 1322; J.A. 97). But there is nothing in the jobsite-friction rule that would necessitate such repeated negotiations. As the majority itself recognizes (654 F2d at 1322; J.A. 97) a single agreement can be negotiated containing a clause which applies to every job where the general contractor's Local 701 employees are present and where union-nonunion friction is therefore possible.

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[63]Such "informational" picketing is lawful even if its ultimate objective is to force the employer to recognize and bargain with the union. *Smitley v. NLRB*, 327 F2d 351, 352, 353 (9th Cir 1964) (Picketing held not to violate § 8(b)(7) even though "an object of the picketing was to secure recognition"); *Barker Brothers Corporation v. NLRB*, 328 F2d 431 (9th Cir 1964), and cases cited therein.

[64]No such argument was made by any party to this case below. The Board conceded on oral argument to the panel (in response to the court's question) that no such practical problems exist.

The contention that "enforcement problems" of such a clause "remain severe" (654 F2d at 1322; J.A. 97) ignores decades of experience under the NLRB's rule for common-situs secondary boycotts. That rule permits a union to picket a construction jobsite only when employees of the primary employer are on the jobsite.[65] The test of legality based on the jobsite presence of particular employees is thus commonplace in the construction industry and is no more difficult to apply in determining the legality of enforcing a subcontractor clause than in determining the legality of a picket line.

9. **The ruling that subcontractors' employees can be forced to join a particular union is erroneous.** This signatory subcontractor clause requires subcontractors' employees to be members not just of *some* union, but of this *particular* union. The majority's short discussion of this point repeats its same basic errors which have been shown above. The requirement of membership in a specified union serves none of Congress' aims, serves only to organize employees from the top down, and thus finds no shelter from the proviso.[66]

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[65]E.g. *Carpenters' Council of Milwaukee*, 196 NLRB 487, 490, (1972); *Local 519, Journeymen v. NLRB*, 416 F2d 1120, 1124-1126 (DC Cir 1969); *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 27 LRRM 1108 (1950).

[66]The three-judge panel held that the proviso protects a clause that applies "when the employer or his subcontractor has employees who are members of the signatory union at work *at some time* at the jobsite at which the employer wishes to engage a nonunion contractor" (609 F2d at 1347; J.A. 56; emphasis added). Under this rule a general contractor who engages a union subcontractor whose work terminates at the earliest stage of a project (for example, an excavation subcontractor) can be barred from subcontracting to a nonsignatory the landscaping work, which is to be performed months and perhaps years after the excavation work is completed and the union engineers have left the site. Application of the proviso to a clause with such a broad reach does not serve the proviso's purpose. Such a clause might also make a union signatory subcontracting obligation retroactively operative to a project where all subcontractors are nonsignatory and where the general contractor uses no union employees but where, through inadvertance, a subcontractor's subcontractor appears with a union member during the final phases of the project.

Just as there is no risk of jobsite friction between union and nonunion employees working on different jobs separated by miles of space, so there is no such risk when they work in the same job but are separated by time.

CONCLUSION

For the above reasons the Court should rule that the clause herein violates § 8(e), is not protected by the construction industry proviso, and (in the words of § 8(e)) is "unenforceable and void." The judgment of the court of appeals should be reversed and that court should enter an appropriate order requiring Local 701 and AGC to cease and desist from enforcing or giving any effect to this clause.

Respectfully submitted,

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Nos. 80-1798, 80-1808 and 81-91

In the Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondent.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit misinterpreted this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) by concluding that it authorized imposition of top-down organizing restraints upon third parties whenever the restraints are imposed in the context of a collective bargaining relationship.

2. Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the construction industry proviso to 8(e) immunizes all subcontracting restraints imposed in the context of a collective bargaining relationship.

3. Whether Congress intended to confine the scope of the construction industry proviso of 8(e) to those circumstances

where there was potential for jobsite friction between union and nonunion workers.

4. Whether the Ninth Circuit misinterpreted this Court's holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967) by promulgating a mixed motives test.

5. Whether 8(b)(7)(C) may be applied to prohibit organizational or recognitional picketing solely where a 9(a) election could be conducted.

6. Whether this Court should reconsider its holding in National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967), which held that a primary-secondary litmus test was to be employed to determine the lawfulness of a subcontract clause.

LIST OF PARTIES

NATIONAL LABOR RELATIONS BOARD

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 701

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

WOELKE & ROMERO FRAMING, INC.

CARPENTERS LOCAL NO. 944

CARPENTERS LOCAL NO. 235

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*Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. is an affiliate of the Associated Builders and Contractors, Inc.

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NOS. 80-1798, 80-1808, and 81-91

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC., Petitioner

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v.

NATIONAL LABOR RELATIONS BOARD, Respondent

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

OPINIONS BELOW

The opinion of the limited en banc panel of the Court of Appeals for the Ninth

Circuit is reported at 654 F.2d 1301. (Jt. App. I p. 63-119).[1] The Opinion of the three Judge panel of the Court of Appeals for the Ninth Circuit is reported at 609 F.2d 1341 (1979). (Jt. App. H pp. 48-62). The Decision and Order of the National Labor Relations Board is reported at 239 NLRB No. 43. (Jt. App. G pp. 32-47).

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered and filed on the 17th day of April, 1981. The Petition for a Writ of Certiorari was filed on April 29, 1981, and granted on October 5, 1981 (Jt. App. J p. 110). The

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[1]This designation is to the second volume of the Joint Appendix and all references hereinafter are to the second volume of the Joint Appendix.

jurisdiction of this Court rests on 28 U.S.C.A. 1254(1).

STATUTES INVOLVED

The relevant provisions of Sections 7, 8(a), 8(b), 8(e), 8(f), and 9(a) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq) are set forth in Appendix D to the Petition for Certiorari. (Pet. App. D, pp. A-183 - A-186).

STATEMENT OF THE CASE

A. Facts.

Preliminary Remarks.

The parties filed a stipulation of facts with the NLRB. As will subsequently appear, it is the effect to be given to these facts which raises the issues presented here.

The Parties.

AGC[2] is an association of employers engaged in all types of construction in the states of Oregon and five counties of southwest Washington. (Jt. App. E pp. 8-12). The employer members delegate their collective bargaining authority to AGC for the purpose, inter alia, of negotiating and entering into collective bargaining contracts with various unions.

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[2]Oregon-Columbia Chapter, The Associated General Contractors of America, Inc.

AGC has approximately 200 member contractors.

Engineers[3] is a labor organization which represent individuals in the construction industry who perform contractually defined work under various labor agreements, including that with AGC. Its jurisdiction is generously defined by the collective bargaining agreement as follows:

> "assembly and/or disassembly in the operation of all equipment within the jurisdiction of the union, regardless of its use or whether such equipment is mechanically, electrically, electronically, hydraulically, automatically or remotely controlled."

It extends to all heavy highway work, building work and also to off-site work at quarries, asphalt plants, etc.

Petitioner[4] is an organization of contractors whose members are both union and

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[3]International Union of Operating Engineers, Local 701.

[4]Pacific Northwest Chapter of the Associated Builders and Contractors, Inc.

non-union. One of its organizational purposes is to extend the concept of merit shop, i.e., the opportunity of union and non-union contractors to bid upon and work on jobs based exclusively upon price, quality and service and without discrimination of any sort.

The Contract.

The Collective Bargaining Agreement contains the following provisions:

"ARTICLE VIII

"Subcontractors and Other Employers

"Section 1. Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

"* * * * * *."

The agreement required AGC, and all other signatory employers, to acknowledge Engineers as the sole and exclusive representative of employees covered thereunder; and compelled all employees to become members of the union not later than the eighth day following commencement of employment or be terminated (Jt. App. F p. 16).

B. Procedural Background.

Petitioner filed charges on April 26, 1977, against the Engineers and AGC. The charges alleged that the Engineers and AGC entered into an agreement containing a clause which prohibited subcontracting to all non-signatory employers and that such clause violated Section 8(e) of the National Labor Relations Act. General Counsel's Office issued a complaint; the parties stipulated to the facts; and the matter was transmitted directly to the Board for decision. (Jt. App. A p. 1, B pp. 2-5, C p. 6, D p. 7, E pp. 8-12).

On November 13, 1978, the NLRB rendered its decision and order in this and related cases. It held that subcontracting clauses were immunized from 8(e) scrutiny by reason of its self-contained construction industry proviso. It further held that such provisions may not be enforced through self help. (Jt. App. G pp. 32-47).

Petitioner filed its petition with the United States Court of Appeals for the Ninth Circuit (herein "Court of Appeals") for review of this decision and order as did AGC and the Engineers and the Board cross-petitioned for enforcement.

The Court of Appeals consolidated, for purposes of oral argument and decision, the proceeding brought by the petitioner herein with Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke &

Romero Framing, Inc.), 239 NLRB No. 40 (1978). A three-judge panel of the Court on December 26, 1978, held that the subcontracting clauses were unlawful and further that self-help could not be utilized to enforce such provisions. (Jt. App. H pp. 48-62).

Thereafter, the NLRB and the Engineers petitioned for rehearing en banc. The Court granted this motion and ordered rehearing before a limited en banc panel as provided by Public Law 95-486, 92 Stat. 1629, 1632 and Rule 25 of the Court.

On April 17, 1981 the Court of Appeals rendered its opinion reversing the panel and entered judgment affirming the decision and order of the NLRB. (Jt. App. I, pp. 63-109).

SUMMARY OF ARGUMENT

This case involves whether an agreement between a group of general con-

tractors and a union to boycott all nonunion contractors violates the National Labor Relations Act. This agreement permits systemic discrimination against employees who have elected to exercise their Section 7[5] right to "refrain" from representational activities. Given historic hiring hall abuses, it has the further effect of exascerbating proscribed activity under Title VII.[6]

Not only do the workers suffer, the consumer suffers as well. The wholesale exclusion of qualified subcontractors from jobsites has, in simple economic terms, a tendency to limit competition and thereby to artificially escalate costs. The consumer pays or does without.

Employers similarly suffer. The nonunion employer is placed in the dilemma

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[5] 29 U.S.C. § 157 (herein Section 7).

[6] 42 U.S.C. § 2000(e) et seq.

of violating his employees' Section 7 rights or of being boycotted from performance of substantial work opportunities. The union general contractor is precluded from utilizing subcontractors of his own chosing with consequent potential losses of production efficiency and increased cost. If the Court is free to make a normative judgment in this matter, the subcontracting restraints should be declared unlawful.

The Court of Appeals decision is in conflict with this Court's decision in Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975).[7] Connell held that the construction industry proviso was to be narrowly construed; that any subcontracting provision which was more restrictive than the objective of the Act would support

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[7]Hereinafter referred to as Connell.

violated 8(e)[8]; and that Congress merely intended to declare as lawful those subcontracting provisions which foreclosed jobsite friction created by shoulder-to-shoulder contact of employees of union and nonunion employers. The subcontracting restraints in this case do not satisfy the Connell standards.

ARGUMENT

A.

The Normative Judgment

The Court of Appeals decision vests a brutal top-down organizing tool in the hands of construction industry unions. It will have an overt and obvious effect upon the rights of employees bestowed by Section 7 of the National Labor Relations Act (NLRA).

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[8] 29 U.S.C. § 158(e) hereinafter referred to as 8(e).

That section grants to employees the right to "refrain" from collective bargaining activities. If the employer of non-union employees can be compelled to enter into a collective bargaining agreement because of the coercive economic impact that subcontracting restraints will have on his business, then Section 7 rights of employees have effectively been destroyed. They have lost their right to "refrain".

Secondly, the effect of the decision is to create a significant impediment to exercise by employees of their electoral rights guaranteed under Section 9[9] of the NLRA. If an agreement is executed outside the 8(f)[10] shelter,[11] the employee must act quickly or otherwise, through application of contract bar,[12] he will forfeit a right to

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[9] 29 U.S.C. § 159 hereafter Section 9.

[10] 29 U.S.C. § 158(f) hereafter 8(f).

[11] NLRB v. Ironworkers Local 103, 434 U.S. 335 98 S. Ct. 651 (1978).

[12] Vincent v. Carpenters Local 1545, 286 F.2d 127 (Cal. 1960).

freely select representation. If the agreement is executed within the protective fold of 8(f), then an employee must petition for an election. The number of construction industry employees who are familiar with the idiosyncracies of 8(f) as it relates to Section 9 rights is miniscule. The effect, therefore, of the Court of Appeals decision, is to destroy Section 9 rights.

The effect on nonunion contractors is straight forward. They face the perfect dilemma. If they remain nonunion, they can expect to be boycotted by in excess of 200 general contractors doing business in the states of Oregon and Washington. Few can survive the economic effect of that juggernaut. On the other hand, if they succumb to the economic reality of the situation and execute a collective bargaining agreement with a union, they deprive their employees of Section 7 rights.

"Wrong" union contractors are placed in an even more precarious circumstance. They are bound by a collective bargaining agreement to a different union claiming jurisdiction over the same work. This employer therefore must consider violation of 8(a)(5) and repudiation of the employees' selected representative, or face the prospect of an early economic demise.

The consumer should not be forgotten in this review of the effects that flow from the Court of Appeals decision. Common economics dictates that the greater the number of competitors for available work, the lower the price will be to the consumer. The correlative principle is that artificial restraints limiting entry into competition are interdicted as per se violations of Section 1 of the Sherman Act, their effect being so pernicious in form as to permit no explanation or justification. Klor's, Inc. v. Broadway-Hale, Stores, Inc., 359 U.S. 207

79 S. Ct. 705 (1959). Clearly the consumer has an economic stake in this matter.

The effect of the boycott of nonunion and wrong union contractors upon the consumer is not merely economic. The quality of service may also suffer. Union subcontractors do not have a monopoly on provision of skilled services. One might argue precisely to the contrary.

Not even union contractors escape the negative effect of this decision. Reduction in the number of qualified bidders may effect the margin of profitability on a job. Swollen bids produced by too few contractors submitting supportive bids may also compel the owner not to build and therefore an economic opportunity to the union general contractor and to his employees will be lost.

Can this decision therefore be justified on any basis? The NLRB proffered none based upon its expertness in the labor

field. Rather, it limited its consideration to a mechanical, almost statutory construction, analysis of this Court's Connell case.

The Court of Appeals fabricated, from whole cloth, supposedly pragmatic justifications for the holding. It urged that limiting enforcement of subcontracting agreements to instances when jobsite friction will arise, creates immense practical problems. The problems identified were those associated with jobsite-by-jobsite negotiations; policing compliance; and potential for jobsite disruption. (Jt. App. I pp. 96-98).

At no time has this petitioner contended that there should be "jobsite-by-jobsite" negotiation of collective bargaining agreements. It is a simple matter to write a collective bargaining agreement to conform to the objectives of the proviso. There is no logical reason why the duration of such an agreement must be limited to a

specific project. It, like others, could be written for an extended term.

The Court of Appeals also found pragmatic justification for subcontracting restraints because of the difficulty in policing jobsites to determine whether there was "any union worker" on the jobsite at any time and because of friction created by union and nonunion contractors working side by side. These contentions are plain nonsense.

The issue is not whether "a nonunion member" is present. Rather, a member of a union may work for a union or a nonunion contractor. The fact of membership in a union does not foreclose working for a nonunion contractor. Free choice is one of the underlying tenets of the Act. The problem, then, is commingling of union members employed by a contractor privy to a collective bargaining agreement with a union and the employees of a nonunion contractor. This is the theoretical caldron of boiling oil.

Typically unions call for and have pre-job conferences with the general contractor. During the pre-job conference the identity of each subcontractor is disclosed. The critical path schedule and projected timing of the presence of each subcontractor on the jobsite is disclosed. The employer may be requested to give the union specific written advance notice of when nonunion contractors will be present. Thus the union knows or has the means to know when a nonunion contractor will be present on the jobsite.

This system also prevents shoulder to shoulder job site friction between employees of union and nonunion contractors. Common situs picketing is proper only when the employees of the primary employer are present.[13] These employers are thus sched-

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[13] Carpenters, District Council of Milwaukie & Vicinity, 196 NLRB 487, 490, No. 60, 80 LRRM (1972), Local Union No. 519, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting

uled to work at different times on the job site.

Nonunion contractors may, for example, work swing shift or weekends when employees of union contractors are not present. Thus avoidance of jobsite friction and of the effects of informational picketing upon neutral employers has produced a practical convention which may be applied, without change, to subcontracting with nonsignatory subcontractors.

Besides the prejob conferences which disclose to the union when nonunion contractors will be present at the job site, construction industry unions have historically policed the jobsite for a variety of purposes. One purpose has been compliance with the labor contract. The second has been to ascertain whether a nonunion contractor is working at times other than those

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[13](Cont.) Industry of the United States and Canada, AFL-CIO, 416 F.2d 1120 (C.A. D.C. 1969).

set forth in the critical path schedule. A declaration that subcontracting restraints in the AGC/701 agreement were unlawful would not change this "policing" aspect of their long-standing relationship one iota.

Even if escalated policing were required, what does this mean? It suggests the absence of friction at the jobsite. It suggests that employees of union and nonunion companies can and do work side-by-side without antagonism. It appears, however, that this conclusion may be legislatively foreclosed and it must therefore be conclusively presumed that mixing of oil and water at the jobsite will indeed produce immediate input to the union from enraged union workers and an appropriate response given.

Each of the factors enumerated above counsel that the Court of Appeals' pragmatic judgment was wrong. Normative factors, on the other hand, overwhelmingly favor a declaration that restraints on

subcontracting be declared unlawful. Each sector of the economy is injured and no pragmatic labor law consideration served.

The question then, is whether the language of the statute, the legislative history, or the Connell decision foreclose a decision which comports with common sense and everyday economic judgments.

B.

LANGUAGE OF STATUTE

The literal language of 8(e) is unambiguous. (Pet. App. D 184). It prohibits entry into any agreement which requires an employer not to do business with any other person. Second, the construction industry proviso to 8(e), states that the section shall have no application to an agreement between a union and an employer in the construction industry.

This Court has instructed not to be trapped into a literal interpretation of this section. Some, but not all, agreements restricting subcontracting fall within its scope. More particularly, in National Woodwork Manufacturers Association v. NLRB, 87 S. Ct. 1250, 386 U.S. 612 (1967) the Supreme Court held that there must be some showing that the objective of the tainted agreement is secondary.[14] The Court commenced its analysis by reciting the

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[14]The Court held that the intended scope of 8(e) should be judged solely by reference to the breadth of 8(b)(4)(A). It concluded that since 8(b)(4)(A) dealt exclusively with activities having a secondary objective that ipso facto a similar interpretation must be given to 8(e). This decision (4-1-4) was met with a sharp dissent. Justice Stewart commented:

> "The Court undertakes a protracted review of legislative and decisional history in an effort to show that the clear words of the statute should be disregarded in these cases."

The dissent's reading of the legislative history demonstrated that it was not the intent of Congress to compel a showing of a secondary objective. There is a substantial argument that the dissent was correct in its analysis of the congressional purpose in the enactment of 8(e). The absolute phrasing of the

> "* * * 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' * * *"

It is further recognized that this principle had particular application to labor legislation which is

> "* * * to a marked degree, the result of conflict and compromise between strong contending forces. * * *"

This Court also has interdicted a literal interpretation of the construction industry proviso to 8(e). In Connell, it held that some construction agreements between a labor organization and an employer are not immunized from 8(e) scrutiny even though confined to jobsite relations.

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[14](Cont'd.) language and the background against which it was enacted strongly suggest that a primary versus secondary dichotomy was not desired nor anticipated. It appears probable that the congressional intent was to regulate contracts, be they of a primary or secondary objective in industry generally and to proscribe only secondary objective agreements in the building and construction industry by enactment of the proviso.

It thus becomes essential to define the congressional purpose from sources extrinsic to the literal language of the proviso in order to determine which agreements are governed by the proviso.

C.

Legislative History

Congress has promulgated a national labor policy. The centerpiece of this policy was Section 7 of the Wagner Act, which originally provided:

> "Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

When the Second World War ended, a well-directed campaign to amend the Wagner Act gained momentum. The intervening years had demonstrated a need to regulate jurisdictional disputes and a need to regulate

practices by unions and not merely employers. In response Congress made structural changes in the National Labor Relations Board; enacted Section 8(b), inclusive of six unfair labor practices[15] directed against unions; adopted a free speech proviso[16]; defined parties' collective bargaining duties[17]; granted employees the right to petition for decertification[18]; granted employees the right to petition for a deauthorization election to free themselves from the umbrella of a union security agreement[19]; and finally, amended Section 7 to explicitly state that employees had the right to "refrain" from collective bargaining and self-organization.

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[15] 29 U.S.C. § 158(b)(1) through 29 U.S.C. § 158(b)(6) (hereinafter referred to as Section 8(b)(1) through Section 8(b)(6).

[16] 29 U.S.C. § 158(c).

[17] 29 U.S.C. § 158(d).

[18] 29 U.S.C. § 159(c).

[19] 29 U.S.C. § 159(e).

The theme of these modifications was two-fold. First, to create a balance of power between management and labor which had not existed under the Wagner Act. Second, to grant substantial power to employees to control their own destiny by declaring it to be an unfair labor practice for a union to restrain or coerce employees in the exercise of their Section 7 rights and by furnishing employees with access to the electoral process.

In 1957 the Senate Select Committee on Improper Activities in Labor or Management Field commenced hearings. Chaired by Senator McClellan, the Committee investigated alleged wrong-doing in the labor-management field.[20] An important part of their investigation was "top-down" organizing techniques which were flatly condemned.[21]

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[20]Cox, Law and the National Labor Policy, 18 (1960), S. Res. 74, 85th Cong., 1st Session.

[21]Final Report of Select Com. p. 3, 61-62.

As a direct product of these investigations, and the public clamor aroused by them, Congress enacted the Landrum-Griffin Act. Restraints against secondary boycotts were tightened; 8(b)(7) was enacted to prohibit picket or other coercive actions calculated to compel an employer to accept a collective bargaining relation with a minority union[22]; 8(e) was enacted to outlaw agreements, a by-product of which was indirect coercion of employees of third parties to accept representation; and finally special permission was granted to execute prehire agreements in the construction industry.[23]

A primary intent of the Landrum-Griffin Act was to strike harshly at coerced imposition of minority representation upon bargaining unit majorities. Thus the Act

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[22]29 U.S.C. § 158(b)(7) (hereinafter referred to as Section 8(b)(7).

[23]Section 8(f).

struck down coercive methods employed by unions to effectuate top-down organizational objectives. It also precluded employer acquiescence which had the same effect. The right of an employee to free choice in an atmosphere free from contractual or economic coercion was thus guaranteed.

Common sense dictates that Congress intended the construction industry proviso to 8(e) to be construed narrowly and solely with a view toward relevant differences between the construction industry and industry generally.

There are three such differences. First, projects frequently are of a short duration; second, there is an enhanced concern about nonunion contractors competing with the advantage of lower wages and fringe benefits; and finally, there is the problem that may be created from commingling of union and nonunion employees at a common jobsite.

The construction industry is marked by its transitory nature. Jobs may be of short duration. The employees shift from employer to employer as work availability changes. There are unique problems in determining whether it is appropriate for an employer to grant recognition.[24]

From an employer's vantage point, it is important to be able to enter into a lawful collective bargaining agreement which sets forth terms and conditions of employment for employees currently on its staff and those to be hired as a result of successful bidding on future projects. A need to project labor costs prior to the time a stable, representative work force came into being was critical. To satisfy these differences, a limited immunity from the provi-

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[24] Trammell Construction Company, Inc., 126 NLRB No. 163, 45 LRRM 1489 (1960); M. B. Kahn Construction Co., 210 NLRB No. 166, 86 LRRM 1319 (1974); Temple Associates Inc., 161 NLRB No. 144, 63 LRRM 1479 (1966).

sions of 8(a)(1) and (2) and 8(b)(1)(A) was necessary. Bricklayers Local 3, (Eastern Washington Builders, Chapter of AGC), 162 NLRB No. 46, 64 LRRM 1085 (1966). 8(f) was enacted in response. It granted immunity to employers and to unions in the construction industry to enter into collective bargaining agreements even though the union had failed to establish or in fact lacked majority status. Agreements entered into under the shelter of 8(f) are voluntary. Agreements coerced through picketing are outside its scope.[25] No element of economic leverage is to be present. The resulting 8(f) agreement is unique. Until or unless the union obtains majority status, it is unenforceable. NLRB v. Iron Workers, Local 103, supra.[26]

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[25] See Footnote 11, p. 13, at note 10. Sperry v. Local 562 etc., 210 F. Supp. 743 (1962) and NLRB v. Local 542, International Union of Operating Engineers, 331 F.2d 99 (3rd. Cir. 1964).

[26] See also Dee Cee Floor Covering, 97 LRRM 1072, 232 NLRB No. 72 (1977).

In granting this special statutory exemption to the construction industry, Congress did not intend to trample upon rights of construction industry employees. It was obviously concerned that there might be an erosion of their right to be free from representation by a particular or any union. In consequences, Congress explicitly granted these employees permission to file a petition for decertification notwithstanding the NLRB's time-honored contract bar rules. Furthermore, Congress explicitly granted employees the right to file a petition for deauthorization. Such a petition has the effect of expunging a seven day union security clause for any prehire agreement. In the one circumstance, construction industry employees would be free of representation and in the other, of compelled membership in a union not of their own choosing. The tools to exercise freedom of choice were

thus left squarely in the hands of the employees.

The 8(f) solution is complete in itself and does not depend in whole or in part for its vitality upon 8(e) or the proviso thereto. The unique problems associated with the construction industry relating to its transitory nature and the difficulty of applying traditional Section 9 principles, were solved exclusively by 8(f).

The second difference, i.e., competition against employers utilizing substandard wages, is equally not the basis for distinguishing the construction industry from other industries.

In 1959 union standards provisions were deemed secondary and not primary.[27] In

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[27]There are two types of restraint on subcontracting. The first is a "union signatory" clause. Under such subcontracting restraint, the employer may deal solely with an employer who has contracted to adhere to each and every term of a collective bargaining agreement, including both its economic and its noneconomic provisions.

consequence 8(4)(b) prohibited coercion to obtain such a provision. See Teamsters Union (Wilson & Co., Inc.), 143 NLRB No. 117, 53 LRRM 1475 (1963); Truckdrivers Union Local 413 (Patton Warehouse, Inc), 140 NLRB 1474, 52 LRRM 1252 (1963).

The Board reversed itself and held that union standards clauses are primary and therefore did not violate 8(e). Highway Truckdrivers and Helpers, Local 107 (S.E. McCormick, Inc.), 159 NLRB No. 1, 62 LRRM 1224 (1966).

If Congress intended, as indeed it may, by the 8(e) proviso, to declare only that union standards clauses were lawful, which the abtruse legislative history would

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[27](Cont'd.) The second type of restraint is what is known as a "unions standards" agreement. Under the terms of this type of restraint, a subcontractor can be employed only if it matches the economic provisions of the industry's area collective bargaining agreement. This latter category of agreement contains no compulsion to join any union but merely assures that competition between contractors will not be based upon substandard wages and/or working conditions.

support, then the union signatory clause here is unlawful. On the other hand, if Congress intended merely to recognize wage competition as the basis for distinguishing between this industry and others, declaring a union signatory clause lawful would go far beyond that limited objective.

The third difference between the construction industry and industry generally is the thrusting together of employees on a common jobsite. Congress may have anticipated that commingling of union and nonunion employees created potential for friction or conflict. It thus desired to grant immunity to the construction industry employer and unions to enter into hot cargo provisions in order to prevent jobsite friction from frustrating completion of a project. Exclusion of nonunion or wrong union employers and their employees from jobsites <u>at times</u> when the general contractor's employees were present would accomplish this objective. It

would not be necessary to grant special permission to enter into hot cargo agreements as to times or places when nonunion or wrong support, then the union signatory clause here is unlawful. On the other hand, if Congress intended merely to recognize wage union contractors' employees are absent from a common jobsite. Picketing or other economic activities directed at employees of an absent employer constitute a secondary boycott.[28] The Board in the implementation of its Moore Dry Dock Standards[29] recognized and approved

> "the use of reserve time schedules during which the primary was scheduled to work on a common situs on the ground that they serve to isolate and restrict the labor dispute of the parties immediately involved so as not to unnecessarily enmesh neutrals."

Operating Engineers, Local 450 (Linebeck

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[28] See Footnote 13, p. 19.

[29] Sailors' Union of the Pacific, (Moore Dry Dock Co.), 92 NLRB No. 93, 27 LRRM 1108 (1950).

Construction), 219 NLRB No. 133, 90 LRRM 1104. Picketing at times when the primary employer is present but all other employers absent would be inconsequential as the employees of the nonunion or wrong union employer would not respect the picket. Linoleum & Carpet Layers Local 1236 (Cascade Employers Association), 180 NLRB 241, 73 LRRM 1159 (1969). It is thus commonly recognized that union and nonunion contractors can work on the same project without fear of disruptive picketing so long as they are scheduled to work at different times. It is respectfully submitted that Congress intended the construction industry proviso to furnish 8(e) immunity only at times and places where common site picketing would disrupt completion of a construction project.

This analysis of the legislative intent has found substantial judicial support in Essex County and Vicinity Dist. Council of Carpenters, Inc., etc. v. Nation-

al Labor Relations Board, 332 F.2d 636 (3rd. Cir. 1964) wherein it was stated:

> "* * * This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project. * * *"

Drivers, Salesmen, etc. Local Union No. 695 v. NLRB, 361 F.2d 543, 553 (U.S. App. D.C. 1966).

The Ninth Circuit recently confirmed that a purpose of the proviso was intended

> "* * * to alleviate the frictions that may arise when union men work continuously along side nonunion men on the same construction site." ACCO Construction Equipment, Inc. v. NLRB, 511 F.2d 848 (1975).

The Court held:

> "* * * What appears critical is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with the union craftsmen." Ibid 851

The Court went on to state that:

> "* * * What is analytically fundamental to the proviso is whether union and non-union laborers will be required to work together for more than brief periods of time."[30]

See also, International Union of Operating Engineers, Local 542 (York County Bridge, Inc.), 216 NLRB 408, No. 67, 88 LRRM 1405 (1975), enforced, 532 F.2d 902 (3rd. Cir. 1976). The potential for jobsite friction does not justify a union signatory clause. It is a simple matter to draft a provision which limits the right of a union contractor to utilize nonunion subcontractors at times and places when its own employees performing work at the jobsite within the jurisdictionally relevant craft.

In recognition that neither the overall legislative history nor the material differences between the construction industry and industry support union signatory subcontract clause, the NLRB resorts to

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[30]Footnote 8, 571 F.2d at 851.

isolated statements made by Senator Kennedy speaking from the floor about modifications made in the Conference Committee. II NLRB, Legislative History of LMRDA of 1959, 1433(3); I NLRB Legislative History of LMRDA 943.

Unfortunately there is no backdrop for these remarks. Senate Bill 1555 and the Landrum-Griffith Bill had very little in common as passed by the respective houses. The construction industry proviso was in neither version of the Act prior to conference.[31]

The probative value of these remarks in assessing the legislative intent of Congress was considered and rejected in Connell:

> "The provisos exempting the construction and garment industry were added by the Conference Committee in an apparent compromise

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[31]House Report Number 741, 86th Cong., 1st Sess. 39-40, Senate Report Number 187, 86th Cong., 1st Sess., Conference Report 1147.

> and the Senate Bill, which prohibited them only in the trucking industry. Although the garment industry proviso was supported by detailed explanations in both houses, the construction industry proviso was explained only by bare references to 'the pattern of collective bargaining' in the industry." Ibid 628

The Court refused to give weight to the remarks of Senator Kennedy and rather gave careful consideration to the overall purposes underlying enactment of the Landrum-Griffith Act.

The Court did so because it recognized

> "One of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of wishes of his employees. Congress accomplished this goal by enacting 8(b)(7), which restricts primary recognitional picketing, and by further tightening 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns. Construction unions are fully covered by these sections." Ibid 629

This overriding purpose; the legislative forebearers to 8(e); and the scant contrary statements of legislative history encourages and most certainly does not prohibit, a holding that 8(e) is violated by union signatory contracting restraints.

D.

Connell Revisited

In Connell the general contractor customarily subcontracted all plumbing and mechanical work. It thus hired no employees to perform this work directly and of necessity relied upon both union and nonunion contractors to perform this aspect of a project.

Local 100 desired to organize mechanical contractors who were actual or prospective subcontractors to perform project work on behalf of Connell. The union, in recognition that organizational and recognitional picketing is outlawed, cast

its proposed agreement with prefatory language expressly disclaiming an interest in recognition or in representation of any employee of Connell. It demanded that any subcontractor utilized in the future be signatory to the area collective bargaining agreement with Local 100. Demands were enforced through picketing. This organizational device was calculated to deprive employees of independent employers of their rights under Section 7 of the Act. It was thought to neatly sidestep 8(b)(7) because of the express disclaimer of interest in representation of Connell's employees; to be outside of the ambit of 8(f) in that it was contemplated that no employees would be hired by Connell; and to be free of the prohibitions of 8(b)(4). The Court was unimpressed. Two important guiding principles were distilled:

1. The intent of Congress in both 1947 and again in 1959 was to deprive unions of top-down organizational weapons.

2. Restraints on subcontracting in the construction industry were to be limited to the reason for the passage of the proviso, i.e., those factors which differentiated the construction industry from other industries.

As set forth previously, supra, at p. 29-35, the sole material differentiating factor between the construction industry and other industries is commingling of employees at a common jobsite. However, commingling is not constant. A construction project is completed in stages. These include the excavation stage; the utility installation stage; foundation; iron work, etc. At any one of those stages it may or may not be necessary to have employees of more than one employer commingle. Any clause which prohibits utilization of an employer at times or places where commingling with others is not required, goes well beyond the limited purposes of the congressional grant of immun-

ity. The clause in this case applies to jobsites without regard to whether the contractor intends to employ any employees at that site; it applies without regard to whether employees of the general contractor will be present when the employees of the subcontractor are present at the jobsite; it applies to preclude employers having a collective bargaining agreement with a different union; it leaves open the possibility that an employee of the general contractor will be required to work side-by-side with a nonunion employee performing jurisdictionally different work; and, of course, it fails to preclude a general contractor from acting in the capacity of a subcontractor to a nonunion general, thereby creating a potential for jobsite commingling. The clause thus is overbroad as it applies at times and places where commingling and jobsite friction are not possible. It is also underin-

clusive to the extent that it permits potential for jobsite friction.

To avoid the conclusion that Connell dictates a finding that union signatory clauses are unlawful, the Board recites three contentions:

1. Congress intended to preserve the pattern of bargaining which existed in 1959;

2. Any and all restraints upon subcontracting are lawful if obtained in the context of collective bargaining; and

3. The Connell decision merely fills a gap or loophole 8(b)(7).

1. The Board's "Pattern of Bargaining" Argument is Inconsistent With This Court's Connell Analysis

The Board promotes a simple syllogism:

1. There was a pattern of bargaining in 1959.

2. Congress intended the 1959 amendments to preserve the pattern of bargaining.

3. Therefore, each and every form of restraint upon subcontracting predating 1959 is lawful. Like may syllogisms, the conclusion is only as sound as its minor and major premise.

The minor premise is that there was a pattern of bargaining. As proof, the Board proffered the Lunden Report.[32]

Curiously, in rushing to this conclusion the Board fails to reflect upon at least three impediments. First, the Board's own General Counsel, after conducting a painstaking investigation of the construction industry into the usage of subcontracting clauses in 1959, concluded:

> "* * * Moreover, the study did not deal with the precise issue involved herein, viz., whether and

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[32] "Subcontracting Clauses In Major Contracts" by Leon E. Lunden, pp. 579-586 and 715-723.

> to what extent there existed 'particular union' subcontracting clauses in the construction industry in 1959."
>
> Labor Relations Yearbook (1976), p. 308.
>
> "In view of the fact that the Lunden study was inconclusive on the instant issue, the Office of the General Counsel undertook its own study of construction industry clauses existing in 1959. * * *"
>
> ibid. pp. 308-309.
>
> "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic * * *. * * *" (Emphasis Added)
>
> ibid. p. 309.

Second, this Court in Connell rejected the identical argument. It concluded that rather than to constitute an adoption of the common law of bargaining Congress instead intended the proviso to be

a "partial substitute" for an attempt to overrule this Court's decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951).

Third, the argument proves too much. General Counsel has previously acknowledged that agreements of the sort present in Connell were part of the 1959 mosaic. Labor Relations Yearbook (1976), p. 309. He must therefore either urge that Connell be reversed or conclude the hollowness of this argument.

2. Collective Bargaining Relation

The Board, by seizing language out of context from the Connell decision asserts that any and all restraints upon subcontracting if obtained in the context of collective bargaining are lawful.

To support this proposition it quotes the following passage from Connell:

> "* * * Its (the 8(e) proviso) authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the Denver Building Trades problem, possibly to common site relationships in particular jobsites as well." Ibid 633.

The Board reads this phrase in the disjunctive. It thus asserts that all restraints on subcontracting in the context of collective bargaining are lawful. It further urges that even in the total absence of a collective bargaining relationship, that restraints on subcontracting are lawful provided the common situs Denver Building Trades type relationship is present on a specific job site.

The Opinion of this Court, however, cannot be understood by slicing a single sentence from it and totally ignoring the context within which it was presented. It is apparent that this Court meant the phrase to be read in the conjunctive and

that secondary restraints on subcontracting would be construed as lawful only when:

1. They were negotiated in the context of a collective bargaining relationship; and

2. They cured common site friction on particular jobsites.

The statute states merely that "an agreement" pertaining to the construction site is lawful. The Supreme Court has held that some agreements are unlawful even though confined to the construction site. There is no evidence within the structuring of the statute that suggests that agreements in the context of "collective bargaining" are sheltered and those outside of it are not. Nor is the legislative history helpful. Neither Sand Door[33] nor NLRB v. Denver Building & Construction Trades address this

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[33] Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., et al, v. NLRB, 357 U.S. 93 (1958).

problem. The legislative history can be reviewed in its entirety and there is not one whisper of a legislative intent to distinguish between "stranger" and "collective bargaining" relationships. The statute is thus facially neutral and there is no relevant legislative history to assist.

One might indeed inquire just what a collective bargaining relationship means. The Dictionary of Industrial Relations does not contain it.[34] It does define collective bargaining to denote:

> "* * * the process whereby representatives of labor and management work out the wages, hours and other terms and conditions of employment to be embodied in an agreement that is to govern the relations of the parties for a specified period of time."

It would be fair to assume that such a relationship contemplates that an employer will have a substantial and representative work

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[34] Roberts, Dictionary of Industrial Relations, Revised Edition, Harold Roberts.

force; that the majority of that work force have designated the union as their agent for purposes of collective bargaining; and that the employer and the union bear an obligation, one toward the other, to bargain in good faith with a view toward reaching agreement. This is not, however, what the NLRB has held. Rather, in Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America (Donald Shriver, Inc. and Sullivan-Kelly & Associates), 239 NLRB No. 42 (1978), aff'd 635 F.2d 859 (D.C. Cir. 1980), Topaz was a framing subcontractor. All crafts on the project were "union" except Topaz' employees. They had never been party to any labor contract. The union threatened to picket Topaz if it did not sign a contract with it. When Topaz refused to sign a standard Carpenters Master Labor Agreement, picketing commenced. At no time did the union purport to repre-

sent or in fact represent the majority of Topaz' employees.

The NLRB held that the demand of the union to represent all employees, followed as it was by picketing, constitutes an adequate collective bargaining relationship to grant immunity to the subcontracting clause contained within the proffered collective bargaining agreement.

This conclusion rests on the thinnest of reeds. The holding stands for the proposition that a collective bargaining relationship arises even though the union lacks majority status; it coerced the employer to recognize it and compelled employees to join. Besides the self-evident preposterousness of the proposition, it flies squarely in the face of the Supreme Court's admonition in NLRB v. Iron Workers, Local 103, supra, that 8(f) agreements must be the product of voluntary and not coerced consent. If indeed this kind of relation-

ship can be deemed that of "collective bargaining," it demonstrates and underscores the inadvisability of relying on such a relationship as a predicate to immunizing agreements which are otherwise susceptible of 8(e) liability.

Of course it should be asked why the existence of a collective bargaining relationship is significant. Why should it make a difference? Why should agreements in the construction industry where there is a "collective bargaining relationship" be immune but those in other industries not be immune?

The justification might be articulated in a work preservation frame of reference. In other words, where the intent is to benefit the specific bargaining unit on whose behalf the bargaining is undertaken, the clause should be lawful. But this misses the point. In order that any agreement, be it in the construction industry or

otherwise, fall within the purview of 8(e), there must be a finding that it is the intent of the tainted proviso to benefit those who fall outside the pale of a primary objective. It seems probable that when the Supreme Court in Connell employed the term "collective bargaining relation" it had the primary versus secondary dichotomy announced by prior case law in mind.

It is most difficult to articulate a reason that the existence of a "collective bargaining relationship" should shroud a secondary objective and control the labor policies of neutral employers. Certainly there is nothing in the nature of the construction industry, in this regard, which distinguishes it from any other industry.

Third, the phrase "collective bargaining relation" is a dramatic oversimplification. As may be seen from the broad contractual statement of jurisdiction, Local 701 purports to cover many speciali-

ties. From excavation contractor to crane operator atop a building anything that possesses a button to actuate its mechanism falls within their jurisdictional claim.

The construction industry has developed sophistication. There are a host of speciality subcontractors. The specialities produce efficiency. The general contractor may perform one or more of these specialities, to the extent that it possesses supervisory skill and necessary equipment. The balance of the work is subcontracted.

It is thus not unique to find a general contractor who employs a steady crew of crane operators but who has historically and always delegated excavation and utility work to third parties for want of competence to handle it themselves. Thus the collective bargaining relationship which exists with the unit applies solely to that narrow specialty. It has no application to and

indeed the general contractor has no specific interest in the rate of pay or level of fringe benefits to be negotiated or paid by specialty contractors to their employees. The general contractor is as much a stranger to the collective bargaining relation of the union to those employees as was Connell.

The above demonstrates that it would be inappropriate to hold that the mere existence of a "collective bargaining relationship" legitimizes all union signatory subcontracting restraints.

3. The Purported 8(b)(7) Loophole Furnishes No Support To The Board

The Board postulates that the collective bargaining agreement in Connell was sui generis; that picketing to obtain it would not be interdicted by 8(b)(7); and that therefore this Court crafted an 8(e) remedy.

The premise of this argument is that 8(b)(7) regulates solely primary picketing, i.e., that which is addressed to the relationship of the employer and employee being picketed. The words of 8(b)(7) do not lend support to this contention. The prefatory words to the statute interdict picketing

> "* * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization. * * *"

If it had been the intent to limit the scope of 8(b)(7) to primary picketing, the article "the" would have been used in lieu of "any".

Second, this construction does not comport with common sense. Congress could not have intended to condemn organizational and recognitional picketing in its primary sense but not have granted relief from the effect of the economic leverage of a general contractor, enlisted by the union, to compel

a third party subcontractor to recognize and deal with a labor organization.[35]

Third, the Board has recognized the broad remedial scope of 8(b)(7). For example, the General Counsel's office has interpreted 8(b)(7) to interdict all forms of picketing to achieve a prehire agreement. Such agreements are executed prior to the time that an employer has any employees on its staff. It is then free to choose to hire through the union hall, or alternately, may choose to subcontract the work to a third party.

As the General Counsel's office concluded:

> "* * * Where a construction industry employer has no unit employees or less than a representative complement, and a union pickets to obtain an 8(f) contract, it is our

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[35]This is the obverse side of the 8(b)(4) coin which condemns picketing where the object is to force a neutral not to do business with the primary employer. Here the secondary employer is being deployed as an organizational tool to permit continuation of business relationship.

> view that since a question concerning representation could not be raised and an expedited election could not be held, such picketing would be violative of Section 8(b)(7)(C) from the first day. * * *."
>
> Labor Relations Yearbook (1979), p. 354.

The above factors make it reasonable to conclude that 8(b)(7) does provide remedies against secondary as well as primary picketing to obtain an organizational and/or recognitional purpose.

CONCLUSION

Petitioner respectfully requests the Court to reverse the Court of Appeals decision and to remand to the National Labor Relations Board with instruction to enter an Order declaring the signatory subcontracting

provisions herein to violate Section 8(e) of the National Labor Relations Act.

Respectfully submitted,

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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

October Term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798)

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Questions Presented

1. Does the construction industry proviso to Section 8(e) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(e), legalize a union-signatory Subcontractor Clause — an agreement to conduct a secondary boycott — simply because it is contained in a collective-bargaining contract between a union and an employer in the construction industry and is limited to jobsite work?
2. Did the Court of Appeals misinterpret this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975), by holding that the construction industry proviso to Section 8(e) of the Act privileges broad union-signatory subcontracting provisions which are not designed solely to eliminate jobsite friction between union and non-union workers at a particular construction jobsite?
3. Did Congress intend that the construction industry proviso to Section 8(e) of the Act legalize broad union-signatory Subcontractor Clauses which are not limited in language, purpose, and use to the elimination of friction at the particular jobsites where union and non-union employees work side-by-side?
4. Does Section 8(b)(4)(A) of the Act, 29 U.S.C. §158(b)(4)(A), prohibit a union from engaging in top-down organizing by striking or picketing to force a contractor to execute an agreement containing a union-signatory Subcontractor Clause otherwise protected by the construction industry proviso to Section 8(e) of the Act?

List of Parties to Proceeding Below

Pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States, a list of the parties in the proceeding below is submitted:

The caption of the within matter contains a listing of the names of all parties in the proceeding below which is numbered Case No. 80-1798 in this Court.

However, Case No. 80-1798 was consolidated with other cases for purposes of oral argument and decision below, which cases are numbered Case Nos. 80-1808 and 81-91 in this Court.

The parties below in those cases are:

1. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.;
2. Oregon-Columbia Chapter, the Associated General Contractors of America, Inc.;
3. International Union of Operating Engineers, Local No. 701; and
4. National Labor Relations Board.

Listing of Parent and Affiliated Corporations

Case No. 80-1798.

Woelke & Romero Framing, Inc., the Petitioner in No. 80-1798, has no parent, affiliated, or subsidiary corporations.

Case Nos. 80-1808 and 81-91.

To the knowledge of counsel for Petitioner Woelke & Romero Framing, Inc., the following corporations are affiliated with the Petitioners in these two cases:

1. Associated Builders & Contractors, Inc., and its affiliated chapters throughout the United States which are incorporated; and

2. The Associated General Contractors of America, Inc., and its chapters throughout the United States.

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OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798)

Petitioner, Woelke & Romero Framing, Inc., respectfully prays that the Supreme Court of the United States review and reverse the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals"), which was entered in this proceeding on April 17, 1981.[1]

OPINIONS BELOW

The judgment and opinion of the limited *en banc* Court of Appeals, which was entered in this matter on April 17, 1981, is styled, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., etc., et al. v. National Labor Relations Board, et al.*, and is officially reported at 654 F.2d 1301 (9th Cir. 1981). It appears at Pet. App. A.[2]

The prior judgment and opinion of a three-judge panel of the Court of Appeals, which was issued on December 26, 1979, is officially reported at 609 F.2d 1341 (9th Cir. 1979), and appears at Pet. App. B.

The Decision and Order of the National Labor Relations Board ("Board"), which was reviewed by the Court of Appeals pursuant to a Petition for Review filed under 29 U.S.C. §160(f), is officially reported at 239 N.L.R.B. 241 (1978), and appears at Pet. App. C.

JURISDICTION OF THE SUPREME COURT

The *en banc* judgment and opinion of the Court of Appeals was entered on April 17, 1981. No petition for rehearing, or for further hearing before the full Court of Appeals, was filed.

---

[1]The within matter was numbered Case No. 78-3468 in the Court of Appeals, and was consolidated for argument and decision in that Court with certain other related cases. The National Labor Relations Board was the Respondent below, and the Unions were Intervenors below.

[2]The opinions and orders below which are to be reviewed in this Court have been reproduced in the Petition for Writ of Certiorari in No. 80-1798, at Appendices A, B, and C. The text reference to them will be "Pet.App." followed by a reference to the appropriate Appendix letter, *i.e.*, A, B, or C.

References to the Joint Appendix herein will be cited to as "J.A., Vol. I" followed by a reference to the appropriate page number.

The Supreme Court's jurisdiction is invoked pursuant to, and rests upon, 28 U.S.C. §1254(1). *See* 29 U.S.C. §§160(f) and 160(e).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§157.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

§158(b)(4)(i) and (ii)(A).

"It shall be an unfair labor practice for a labor organization or its agents — (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is:

> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);"

§158(e).

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

§158(f).

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or

gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

STATEMENT OF THE CASE

Statement of Facts

Woelke & Romero Framing, Inc. ("Woelke & Romero"), is a framing subcontractor in the building and construction industry in Southern California. (J.A., Vol. I, p. 16.) Insofar as is relevant to this case, it had construction subcontracts with various builders and general contractors calling for Woelke & Romero to perform framing work at certain construction jobsites. (J.A., Vol. I, p. 16.)

Woelke & Romero had had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, its various district councils and local unions (including Carpenters Local 944 and Carpenters Local 235 ("Unions") which are involved in this case) since 1974. That agreement was due to expire on June 15, 1977.[3] (J.A., Vol. I, p. 17.)

Between June 3 and August 4, the Unions and Woelke & Romero engaged in collective-bargaining for a new agreement. On August 4, the Unions and Woelke & Romero

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[3]All dates are 1977 unless otherwise indicated.

reached an impasse in bargaining[4] over, *inter alia*, the Unions' demand for the following Subcontractor Clauses:

"103.1.1 Definition of Subcontractor. A subcontractor is defined as any person (other than an employee covered by this Agreement), firm or corporation holding a valid state contractor's license where required by law who agrees orally or in writing to perform, or who in fact performs for or on behalf of an individual Contractor, or the subcontractor of an individual Contractor, any part or portion of the work covered by this Agreement."

"103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

"103.5 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof."

"103.6 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of

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[4]An "impasse" in bargaining has been defined by the Board thusly: "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co., etc.*, 163 N.L.R.B. 475, 478 (1967).

material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement." (J.A., Vol. I, p. 18.)[5]

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[5]The Unions also sought the following additional Subcontractor Clauses which would be immediately effective if the foregoing clauses were invalidated by the Board or a Court:

"103.1 In the event that enforcement of paragraph 103.2 is restrained by issuance of an injunction by a United States District Court upon the petition of a Regional Direction [sic] of the National Labor Relations Board, or otherwise, such provision shall be suspended pending its final adjudication, and the provisions set forth in paragraph 103.3 shall be applicable pending final adjudication thereof.

"103.3 Because of the close relationship between individual Contractors and subcontractors at the jobsite and the close community of interests of the employees on the jobsite with respect to on-site work covered by this Agreement, that is, work done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete or batch plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), herein called 'jobsite work', and because of the Union's concern that subcontractors who are not party hereto will deprive Union members employed hereunder of work opportunities because of lower labor costs, it is agreed as follows:

"103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder are not less than those of contractors performing similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.

"103.3.2 The Contractor shall require each such subcontractor to weekly supply to the Contractor, who will then upon request make available to the Union a copy of the subcontractor's certified labor costs for such job, and to submit to an audit of those labor costs by a certified public accountant upon request of the Union to confirm compliance with 103.3.1.

"103.3.3 Failure to comply with the foregoing subparagraph 103.3.1 and 103.3.2 shall entitle the Union, notwithstanding Article V, to seek judicial relief, upon written notice to the Contractor and the subcontractor, to compel the suspension of such subcontractor's work until there has been compliance, together with attorney's fees for the bringing of such action. In any such court proceeding, the court shall, if it is thereafter in dispute, determine whether there has been compliance." (J.A., Vol. I, pp. 85-88.)

The collective-bargaining agreement to which Woelke & Romero had been party covered the wide geographic area of the eleven Southern California counties, and was applicable to all construction jobsites at which Woelke & Romero might perform services within that area. (J.A., Vol. I, p. 27.) The new agreement the parties attempted to negotiate would have covered the same geographic area. (J.A., Vol. I, pp. 69, 84.)

During the collective-bargaining sessions, the Unions insisted that Woelke & Romero agree to the same Subcontractor Clauses as previously had been agreed to by the Southern California Conference of Carpenters and the contractor associations who negotiate the Carpenters' Master Labor Agreement. At no time during those collective-bargaining sessions did the Unions express any other reason for their insistence on these provisions. (J.A., Vol. I, p. 23.) Since August 4, no further collective-bargaining sessions have been held. (J.A., Vol. I, p. 18.)

In support of the Unions' demand for, and insistence that Woelke & Romero agree to, the Subcontractor Clauses, the Unions picketed the construction jobsites at which Woelke & Romero was working, inducing individuals employed by various other contractors to engage in work stoppages and refusals to perform services for their respective employers. (J.A., Vol. I, p. 19.)

Proceedings Below

On August 11, Woelke & Romero filed an unfair labor practice charge with the Board alleging that the Unions had violated Section 8(b)(4)(i) and (ii)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(b)(4)(i) and (ii)(A), by picketing to force Woelke & Romero to enter into the Subcontractor Clauses, which it believed to be violative of Section 8(e) of the Act, 29 U.S.C. 158(e). On September 23, the Board's General Counsel issued a Complaint on the charge, and the matter was later presented to the Board on

a Stipulation of Facts. Oral argument in this and certain other related proceedings was held before the Board in Washington, D.C., on February 23, 1978. On November 13, 1978, the Board issued its Decision and Order finding and concluding that the clauses were not unlawful under the Act, and that the Unions had not violated Section 8(b)(4)(A) of the Act by picketing to obtain them.[6]

On November 14, 1978, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the Act, 29 U.S.C. §160(f), Woelke & Romero filed a Petition for Review of the Board's Decision and Order with the Court of Appeals.

On December 26, 1979, a three-judge panel of the Court of Appeals entered its consolidated judgment and opinion in this and other related cases in *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc., et al. v. NLRB, et al.*, 609 F.2d 1341 (9th Cir. 1979). The three-judge panel reversed the Board in material part and sustained Woelke & Romero's Petition for Review. On January 30,

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[6]When this matter was pending before the Board in 1978, it was consolidated with several related proceedings. Because of their importance in the application of the Act, the Board took the unusual step of hearing seven hours of oral argument with respect to this and the related proceedings, and decided all of them together. *See Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.)*, 239 N.L.R.B. 253 (1978); *Los Angeles Building and Construction Trades Council and Local Union No. 1497, United Brotherhood of Carpenters & Joiners of America (Donald Schriver, Inc. and Sullivan-Kelly & Associates)*, 239 N.L.R.B. 264 (1978); and *International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)*, 239 N.L.R.B. 274 (1978).

The *Schriver* case was thereafter appealed to the U. S. Court of Appeals for the District of Columbia Circuit, and the *Woelke & Romero* and *Pacific Northwest* cases were appealed to the U. S. Court of Appeals for the Ninth Circuit.

The Board's view of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616 (1975) was expressed in its *Woelke & Romero* decision.

1980, the Board and the Unions filed petitions for rehearing, and suggested rehearing *en banc*.

On August 19, 1980, the Court of Appeals granted the petition for rehearing and ordered the matter reheard before a limited *en banc* panel of the Court of Appeals as provided by Public Law 95-486, 92 Stat. 1629, 1633, and Rule 25 of the local rules of the Court of Appeals.

On October 16, 1980, oral argument before a limited *en banc* Court was held in San Francisco, California. On April 17, 1981, the *en banc* Court issued its judgment and opinion.

The Decisions of the Board and Court of Appeals Below

The Board concluded that the Subcontractor Clauses were union-signatory clauses which obligate the employer not to do business with another unless the latter is signatory to the union's agreement. The Board construed them to be secondary in thrust and within the general prohibition of Section 8(e) of the Act because the clauses are addressed to the labor relations policies of employers other than the contracting employer. The Board further found that the clauses were privileged by the construction industry proviso to Section 8(e) of the Act, since they were sought within the context of the Unions' collective-bargaining relationship with Woelke & Romero. The Board concluded, therefore, that the Unions did not violate Section 8(b)(4)(A) of the Act by striking and picketing Woelke & Romero to obtain the Subcontractor Clauses. The Board decided that the subcontracting provisions were privileged by the proviso because:

> ". . . the construction industry proviso to Section 8(e) permits subcontracting clauses such as those here in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the *Denver Building Trades* problem . . ." 239 N.L.R.B. at 250 (Pet.App.C, pp. 97-98.)

The Board rejected the contention that this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), required that the shelter of the construction industry proviso to Section 8(e) be limited only to those secondary jobsite subcontracting agreements which (1) are *both* contained in the context of a collective-bargaining relationship, *and* operational at times and sites at which the employer has employees represented by the union; and (2) do not require bargaining relationships with a particular union. (Pet.App.C., pp. 92-93.) In effect, the Board held that the mere existence of the collective-bargaining relationship between the Unions and Woelke & Romero, without more, was sufficient to give the Subcontractor Clauses legal shelter under the proviso.

The Court of Appeals initially disagreed with the Board. A unanimous three-judge panel of the Court of Appeals held the Clauses outside the proviso, and unlawful, because they were broader than the proviso's purpose and operational even at sites when and where no union workers were employed:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a non-union subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., et al. v. NLRB, et al.*, 609 F.2d 1341, 1347 (9th Cir. 1979). (Pet.App.B, p. 62.)

That decision was later vacated, however, and the majority of a limited *en banc* Court of Appeals, split 7-4, and sided with the Board and the Unions. (Pet.App.A, p. 1.) The majority of the *en banc* Court concluded that the proviso shelters union-signatory Subcontractor Clauses without regard to the presence or absence of union workers at the

jobsite, so long as such Clauses are contained in or sought as part of a collective-bargaining relationship. Further, the *en banc* majority concluded that unions may strike employers to obtain such Clauses.

The *en banc* Court's dissenters concluded that the original panel opinion of the Court of Appeals was correct, and that the *Connell* decision required the view that the proviso sanctioned only those clauses which were *both* in the context of a bargaining relationship *and* operational only at sites when and where union workers worked alongside non-union workers.

SUMMARY OF ARGUMENT

Petitioner contends that the Board and the *en banc* Court of Appeals below misconstrued and misapplied the intent of this Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), with respect to the shelter afforded subcontracting restrictions by the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. §158(e). Petitioner believes that the Subcontractor Clauses are illegal secondary boycott agreements prohibited by Section 8(e) of the Act.

The Subcontractor Clauses involved in this case massively restrict a construction employer's freedom to do business with firms that do not agree to organize their employees, and the employees of other employers, from the "top down." Such a massive boycott was not intended by Congress to be sheltered from illegality by the construction industry proviso.

Top-down organizing was carefully limited by Congress in 1959. Construction unions were not given a license to exact representation from unwilling employers or employees by economic coercion. Congress did indicate that construction employers and unions could voluntarily execute "prehire" agreements which might have limited such effect. *NLRB v. Local 103, Iron Workers*, 434 U.S. 335 (1978).

However, Congress carefully limited this exception granted by Section 8(f) of the Act, 29 U.S.C. §158(f). Congress otherwise restricted top-down organizing arrangements by construction unions.

When the 1959 Congress added Section 8(e) and its construction industry proviso to the Act at the same time as it added Section 8(f), it did not intend to permit construction unions to use subcontracting agreements as top-down organizing tools. It did intend to permit some no-subcontracting agreements, but only those which were related to construction unions' common-situs interests on particular jobsites. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*. Even though some such agreements may, per force, have a top-down organizing effect, this Court reached the balance between the dual Congressional objectives by indicating that such agreements must not be broader than necessary to achieve Congress' purpose in enacting the proviso. *Id.*

The Subcontractor Clauses here are too broad. Their effect is to organize subcontractors, and subcontractors of subcontractors from the top down, and are not related closely to common-situs interests on those particular jobsites where jobsite friction between union and non-union workers who are employed side-by-side may ensue. The Board and the *en banc* Court below, thus, did not apply this Court's previously articulated delicate balance. The Board and *en banc* Court found the Subcontractor Clauses lawful under the construction industry proviso simply because they were contained in the context of a collective-bargaining relationship, without regard to the massive secondary boycott the Clauses endorse and without regard to the broad top-down organizing effect of the Clauses.

Finally, Congress did not intend that construction unions were to be free to obtain Subcontractor Clauses, even those protected by the proviso, through picketing. Since even proviso-protected clauses may have a limited top-down or-

ganizing consequence, it would be contrary to Congress' intent to permit unrestrained picketing for that purpose. More importantly, it is anomalous to conclude that a union can violate Section 8(b)(4)(B) by picketing to compel one to cease doing business with another, but to permit such coercion as long as the cease-doing-business object is contained in a proviso-protected written agreement. Consequently, Section 8(b)(4)(A) must be interpreted to prohibit picketing to obtain even a proviso-protected Subcontractor Clause.

ARGUMENT

A. SUBCONTRACTOR CLAUSES HAVE BROAD TOP-DOWN ORGANIZING EFFECTS AND ARE CALCULATED TO SATISFY UNION OBJECTIVES OTHER THAN WITH THE CONTRACTING EMPLOYER

1. The Subcontractor Clauses Involved Herein Have Broad Top-Down Organizing Effects

Subcontractor Clauses are of many types: (1) ones which obligate a contractor to utilize a subcontractor who matches the total economic labor costs of the union contract; (2) ones which obligate a subcontractor not to accept work on a picketed construction site; (3) ones which obligate the subcontractor to pay the same wages and fringe benefits (*i.e.*, 2 weeks vacation, etc.) as contained in the contractor's union contract; (4) ones which obligate the subcontractor "not to use" materials made in a non-union shop; (5) ones which prohibit subcontracting altogether; and (6) ones, as here, which obligate the subcontractor to be party to the same union contract with the same union as the contractor with whom the subcontractor wishes to do or is doing business. Depending on the language of the precise clause, the effects may be different. Some clauses may have the effect of preserving work, others may simply remove the economic incentive to subcontract, and still others may have "organizing" effects.

The Subcontractor Clauses in this case are broad and of the latter type. The language of the Clauses reveals their effects:

1. They permit, not prohibit, the subcontracting of work normally performed by the contractors' and subcontractors' employees;
2. They apply only to work of the particular contracting union party to the collective-bargaining agreement, and allow free subcontracting of other work;
3. They apply to all tiers of subcontracting;
4. They apply to the entire geographic area covered

by the agreement;

5. They apply *in futuro* to all construction sites on which the contractor may perform work;

6. They apply to the furnishing and installation of material as well as to the performance of labor;

7. They require *all* provisions of the union contract to be observed by the subcontractor, including the provisions requiring compulsory union-membership as a condition of employees' continued employment, the exclusive hiring of workers only from the union's hiring halls, the payment of specified benefits, and the payment into union health and welfare, pension, and other funds;

8. They apply for the entire duration of the agreement;

9. They require the contractor to provide in a written contract with the subcontractor that the subcontractor will comply with the *full* terms of the union's agreement; and

10. They require the subcontractor and his subcontractor to be signatory to the same union contract as the contractor, *viz.*, with the same union, for the same geographic area, and for the same future duration.

In order for a subcontractor, or a subcontractor of a subcontractor, to be eligible to perform services for a firm which is party to such a clause, therefore, the subcontractor must agree to (1) sign the union's contract, (2) force his employees to become members of that union, (3) recognize that union, (4) hire new or additional employees only from that union's hiring hall, (5) be bound by all provisions of that union's contract for its duration, even after the project for which it was executed is completed, and (6) agree to

force these same conditions on its subcontractors, and their employees, both at the current project and all future ones.[7]

Such requirements must be met whether or not the employees desire to be represented by the particular union in question. The decision, therefore, as to whether employees will be unionized, and by which union, is taken from the employees and placed in the hands of the employer. This "top-down" organizational activity, *i.e.*, employers, not employees, are organized and it is the employer who makes the decision whether the employees will be unionized, is backed by a massive boycott of all firms which do not agree to such requirements.

2. Top-Down Organizing Is Contrary to the Basic Objectives of the Act

Section 7 of the Act, 29 U.S.C. §157, expressly gives the right to decide for or against union representation to employees, not to employers:

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[7]The magnitude of the Subcontractor Clauses' effects can be demonstrated in numbers. Suppose General Contractor A has a union contract with Carpenters Union which contains the Subcontractor Clauses, and undertakes construction services for an owner. Suppose, further, that to perform such services, General Contractor A must or desires to subcontract "traditional" carpenters' work (*i.e.*, drywall, rough framing, forming for concrete, lathing, wood roofing, finish carpentry, weatherstripping, insulation, pile-driving, and millwrights' work) to 10 other firms.

To comply with the Subcontractor Clauses, each of the 10 subcontractors that is not already party to that same union contract as is General Contractor A, must sign and abide by it. Thus, from one Subcontractor Clause, springs 10 union contracts and Subcontractor Clauses.

Suppose, further, that General Contractor A performs 10 projects during the life of the union contract containing the Subcontractor Clauses. One Hundred union contracts and Subcontractor Clauses are the result.

And, suppose, further, that General Contractor A is a member of a local multi-employer group which has 200 members all bound to the same contract containing the Subcontractor Clauses. Twenty Thousand (20,000) union contracts could be the result: 20,000 contractors and subcontractors forced to recognize the union, and forced to force their employees to designate the particular union as their representative, in order to work.

> "*Employees* shall have the right . . . to form, join or assist labor organizations, to bargain collectively *through representatives of their own choosing* . . . and . . . to refrain from any or all such activities. . . ." *Id.* (emphasis added).

These statutory rights of employees are given sanction by other provisions of the Act which seek to enforce them. Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain or coerce" employees in the exercise of such rights, and Section 8(b)(1)(A) of the Act, 29 U.S.C. §158(b)(1)(A), similarly prohibits a union from "restraining or coercing" employees in the exercise of those rights.

In short, the Act places "unionization" decisions in the hands of employees, not unions and employers, and is ". . . wholly neutral when it comes to that basic choice [for or against a particular union.]" *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973).

The normal rule is, therefore, that both a union and an employer commit an unfair labor practice by agreeing to impose union representation upon a group of employees unless a majority of the unit employees have first selected the union as their representative; *i.e.*, minority unions cannot legally enter into collective-bargaining agreements with employers. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961). Top-down organizing is, thus, contrary to the Act's basic objectives.

3. The Exception for Top-Down Organizing in the Construction Industry Was Carefully Limited by Congress

Section 8(f) of the Act, 29 U.S.C. §158(f), is an exception to this rule, and provides, in material part, that the entering into of a union agreement by a construction employer before the union has achieved "majority" representative status among the employees, is not illegal. The exception, how-

ever, is ". . . of limited scope . . ." *NLRB v. Local 103, Iron Workers*, 434 U.S. 335, 345 (1978).

Section 8(f) was added to the Act as part of the 1959 Landrum-Griffin amendments. However, "[o]ne of the major aims of the 1959 Act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Id.* at 346-47; *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*, at 632 (1975). Section 8(f) was motivated by the unique nature of the construction industry, and by circumstances which Congress thought required that unions and construction employers be allowed to execute "pre-hire" or "minority" contracts. As this Court has remarked:

> "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not then represent a majority of the employees:
>
> 'One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral.' H.R. Rep. No. 741, 86th Cong., 1st Sess., 19 1 Leg. Hist. 777 (1959).
>
> The Senate Report also noted that 'representation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers.' S. Rep. No. 187, 86th Cong., 1st Sess., 55 (1959), 1 Leg. Hist. 541-542."

NLRB v. Local 103, Iron Workers, supra, at 348.

The convenience given to construction unions and employers to enter into prehire agreements before the employees had expressed their desires for the union did not, however, mean that construction unions were free to engage

in unlimited top-down organizing. The 1959 Congress also severely restricted organizational and recognitional picketing by the addition of Sections 8(b)(7)(A), (B) and (C), 29 U.S.C. §§158(b)(7)(A),(B) and (C), to the statute. Construction unions were not given any exemption from those proscriptions. Section 8(b)(4) of the Act, 29 U.S.C. §158(b)(4), was amended so as to retain and expand the limitations on secondary boycotts and the "top-down" organizing inherent in use of such boycotts. Construction unions were not exempted from those proscriptions.

Even in Section 8(f), Congress carefully limited the exception for the construction industry. The final proviso to Section 8(f) provides that the normal NLRB contract bar rules would not prohibit the holding of elections during the "prehire" or "minority" contract's term, thereby preserving the ability of employers, employees and unions to utilize the preferred "election route" to designate bargaining representatives. *See* 29 U.S.C. §158(f)(4).

Further, Congress restricted the applicability of Section 8(f)'s shorter 7-day compulsory union membership requirement to the same conditions as exist in other industries by saving the proviso to Section 8(a)(3) and making it applicable to the construction industry, thereby further narrowing the possibility that a minority construction union might discriminate against non-union workers.

Most significantly, Congress spelled out the *limited* nature of agreements validated by Section 8(f). "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." *NLRB v. Local 103, Iron Workers, supra,* at 348 n.10. The House Conference Report clearly established that no coercion of any sort was to be utilized to exact pre-hire agreements from unwilling contractors:

"Nothing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147 on S.1555, 86th Cong., 1st Sess. (1959), I, Legislative History of the LMRDA of 1959, p. 946 (hereinafter "Leg. Hist.").

Thus, the 1959 Congress did not intend to permit construction unions to engage in broad top-down organizing campaigns by economic coercion against the primary employer or anyone else. The Board and this Court have acknowledged that the "pre-hire" or minority union contracts in the construction industry cannot be enforced by picketing, such being restricted by Section 8(b)(7)(C) of the Act, *NLRB v. Local 103, Iron Workers, supra,* that such agreement is ". . . merely a preliminary step that contemplates further action for the development of a full bargaining relationship . . ." *Ruttman Construction Co.,* 191 N.L.R.B. 701, 702 (1971), and that that bargaining relationship ". . . is contingent on the union's attaining majority [employee] support at the various construction sites." *NLRB v. Local 103, Iron Workers, supra.*

4. The Limitations on Top-Down Organizing for Construction Unions Are Exceeded by the Subcontractor Clauses Here Which Propel Union Representation on Employees of Other Employers

The careful limits on top-down organizing in the construction industry established by Congress, this Court, and the Board are exceeded by Subcontractor Clauses such as those involved in this case. The Clauses here require either (1) a total boycott of all non-complying employers in a large geographic area for an unreasonable time, giving the Unions a protective net over the construction market, or (2) excessive top-down organizing of all non-union contractors and subcontractors in the area.

The Clauses reach the labor policies of employers *other* than the contracting employer. The Clauses address, not the labor policies of the contracting employer *vis-a-vis* his own employees in their bargaining or contract unit, but the labor policies of those firms with which the contracting employer wishes to do or is doing business. The absence of a union contract, the absence of union recognition, and the absence of union-represented workers in the subcontractor's work force are the elements revealing that the Clauses affect, not the contracting employer's work force, but the work force of other employers. The Clauses, and the boycott requested by them, are, hence, calculated to satisfy the Unions' objective other than in the primary employer's bargaining unit.

Compliance with the terms of the Subcontractor Clauses by a contracting employer's subcontractor, therefore, requires affirmative action to satisfy union objectives other than in the primary employee unit: the execution of a minority union agreement by another contractor with a *particular* union under the economic compulsion of ineligibility to do or obtain the work of the signatory contractor. Per force, the execution of the contract under such circumstances *immediately propels the particular union* and its representation on the subcontractor's employees. "To hold that a labor organization which does not represent the employees of particular employers and an employer who does not directly employ such employees may by contract impose a bargaining representative not of their own choosing upon those employees . . . is contrary to the basic objectives of the Act . . . It creates conditions for future wholesale discrimination." *Northern California Chapter, The Associated General Contractors of America, Inc. (Op. Engrs. Local 3) et al.*, 119 N.L.R.B. 1026 (1957) (Minority Opinion of Members Rodgers and Jenkins), *aff'd sub nom., Operating Engineers Local Union No. 3 v. NLRB*, 266 F.2d 905 (D.C. Cir. 1959), *cert. denied sub nom. St. Maurice, etc. v. NLRB*, 361 U.S. 834 (1959).

As can be seen, these Subcontractor Clauses are top-down organizing tools, virtually unrestricted in effect, which require the coerced designation of a particular union by the employees in other bargaining units. They contain a license for discrimination contrary to the basic objectives of the Act, and contain few, if any, of the elements of the nation's policy favoring collective-bargaining by employees through "representatives of their own choosing."[8]

B. THE SUBCONTRACTOR CLAUSES ARE SECONDARY UNION-SIGNATORY CLAUSES WITHIN THE GENERAL PROSCRIPTION OF ILLEGALITY CONTAINED IN SECTION 8(e) OF THE ACT

The 1959 Congress not only added Sections 8(b)(7) and 8(f) to the Act, but also enacted another provision, Section 8(e), 29 U.S.C. §158(e), rendering illegal so-called "hot cargo" agreements; *i.e.*, agreements to conduct a secondary boycott. The addition of Section 8(e) to the Act was for the purpose of closing what Congress believed was a loophole in the secondary boycott provisions of Section 8(b)(4).

Section 8(e)'s basic thrust was to render illegal those contractual provisions having *secondary* objectives; *i.e.*, agreements whereby the employer ceases or refrains from handling or using the products or services of another. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967); *NLRB v. Enterprise Ass'n., etc., Pipefitters*, 429 U.S. 507 (1977).

Thus, in enacting Section 8(e) of the Act, Congress sought to prohibit the "agreement to conduct a secondary boycott," in effect plugging the loophole thought to have been created

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[8]*See* Burstein, "The 'Hot Cargo' Clause," 11 N.Y.U. Ann. Conf. on Labor, 153, 156-57 (1958), where the author points out that for organizational purposes, hot-cargo agreements have been used most effectively in the construction and transportation industries.

by this Court's decision in *Carpenters Union v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

In *National Woodwork Mfrs. Ass'n, supra*, this Court explained that not all agreements which literally may cause one employer to cease doing business with another were meant to be prohibited by Congress,[9] and stated the test to determine which such agreements were within the Congressional intent and the scope of the Section 8(e) prohibitions:

> "The determination whether the [challenged provision] . . . violated §8(e) . . . cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement . . . would, within the intent of Congress, become secondary. There need not be an actual dispute with the boycotted employer . . . for this activity to fall within this category, so long as the tactical object of the agreement and its maintenance is *that* employer, thus making the agreement . . . secondary in its aim. *The touchstone is whether the agreement or its maintenance is addressed*

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[9]The provision challenged in *National Woodwork* permitted the union members of the contracting employer not to handle millwork which had been prefabricated at a mill. 386 U.S. at 615 n.2. The Board had found that millwork customarily had been done at the construction jobsite, and the Court found substantial evidence to support that finding. The Court held that the provision was addressed to the labor relations policies of the contracting employer vis-a-vis *his own* employees inasmuch as it related solely to the *preservation of work normally done by the contracting employer's employees;* it merely permitted a strike of the contracting employer's employees in furtherance of their effort to preclude the employer from taking away their normal work. Hence, the provision was primary, not secondary, in thrust, and not within the scope of the general Section 8(e) prohibition. *See NLRB v. Enterprise Ass'n., etc., Pipefitters, supra*, 518-20.

to the labor relations of the contracting employer vis-a-vis his own employees."

386 U.S. at 644-45 (emphasis added) (footnotes omitted).[10]

The distinction between clauses with secondary aims which are within the scope of Section 8(e), and primary clauses which are not, has been spelled out by the Board, as follows:

> "Contract clauses which purport to limit subcontracting to employers who are signatories to union contracts, so-called union signatory clauses, and contract clauses which purport to acquire for bargaining unit employees work which has traditionally been performed by employees of other employers, so-called work acquisition clauses, have been held to violate the Act. Such clauses are viewed as not being designed to protect the wages and job opportunities of unit employees covered by the contract, but as directed at furthering general union objectives and undertaking to regulate the labor policies of other employers. Absent a direct relationship to protection of the work of unit employees, such clauses are considered as having an unlawful secondary effect and are proscribed by Section 8(b)(4) and (e).
>
> "On the other hand, however, contract clauses whose basic aims are to limit subcontracting so as to preserve for unit employees work which has customarily been performed by them, or in some instances to recapture work regarded as fairly claimable, so-called

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[10]This Court recently reaffirmed Section 8(e)'s "secondary" v. "primary" distinction. In *NLRB v. Int'l. Longshoremen's Ass'n.*, 447 U.S. 490 (1980), this Court stated:

> "Section 8(e) makes unlawful those collective-bargaining agreements in which the employer agrees to cease doing business with any other person. Although §8(e) does not in terms distinguish between primary and secondary activity, we have held that, [in Section 8(e)] . . . Congress intended to reach only agreements with secondary objectives. (citations omitted)"

> unit protection clauses, and contract clauses designed to limit subcontracting of unit work to employers who maintain the same standards of employment, thus minimizing the economic incentive to subcontract, so-called union standard clauses, have been held to be lawful. The underlying rationale for the lawful character of unit protection and union standard clauses is that the union has a primary interest in preserving unit work for unit employees and to insure that negotiated standards will not be undermined."

Heavy, Highway, Building and Construction Teamsters Committee for Northern California, et al. (California Dump Truck Owners Association), 227 N.L.R.B. 269, 272 (1976).

The Subcontractor Clauses here are addressed to the "secondary," not to the "primary," aims of the Unions. The provisions do not prohibit subcontracting or attempt to "preserve" work or maintain wage standards for Woelke & Romero's employees. Rather, the provisions permit the subcontracting of Woelke & Romero's work, but only to firms which are signatory to, and do the work under, the same Carpenters Unions' contract to which Woelke & Romero is party. The provisions are, therefore, classic "union-signatory" clauses addressed to the labor relations policies of persons *other than* the contracting employer, here Woelke & Romero. *See, e.g., NLRB v. I.B.E.W., Local 769*, 405 F.2d 159 (9th Cir. 1968); *General Teamsters, etc., Local No. 982 (J. K. Barker Trucking Co.)*, 181 N.L.R.B. 515, 519-20 (1970), *aff'd. sub nom., Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322 (D.C. Cir. 1971); *Cement Masons Local Union No. 97, AFL-CIO (Interstate Employers, Inc.)*, 149 N.L.R.B. 1127 (1964); *Orange Belt District Council of Painters No. 48 (Calhoun Drywall Co.)*, 328 F.2d 534 (D.C. Cir. 1964).

So viewed, the Subcontractor Clauses are "secondary" provisions within the general proscription of Section 8(e)

of the Act. *Cf. National Woodwork Mfrs. Ass'n v. NLRB, supra; Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1977).

They are illegal under Section 8(e) of the Act because they require Woelke & Romero not to do business with non-complying firms, unless they are saved by the construction industry proviso to Section 8(e).

C. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE ACT WAS NOT INTENDED TO PERMIT CONSTRUCTION UNIONS TO USE SUBCONTRACTOR CLAUSES FOR TOP-DOWN ORGANIZING PURPOSES

The 1959 Congress did not prohibit *all* secondary boycott agreements when it enacted Section 8(e) of the Act. It exempted certain secondary agreements in the garment and construction industries. Two provisos were added to Section 8(e)'s broad proscription of contractual agreements to achieve secondary aims. "The provisos exempting the construction and garment industries were added by the Conference Committee in an apparent compromise between the House bill, which prohibited all 'hot cargo' agreements, and the Senate bill, which prohibited them only in the trucking industry." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra*, at 628 (1975).

The garment industry proviso exempted *all* forms of secondary agreements and secondary conduct from both Section 8(e) and Section 8(b)(4)(B) in order to counteract ". . . the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors. . . ." *National Woodwork Mfrs. Ass'n v. NLRB, supra*, at 638; *see, e.g.*, 105 Cong. Rec. 6668, 17327, II Leg. Hist. 1377 (1959) (Remarks of Senators Kennedy and Javits). The debates concerning Section 8(e) and the concern for the garment industry rested on the notion that garment industry unions needed to use Subcontractor Clauses for union organizational goals. For example, Senator Javits remarked:

". . . the labor bill now in conference . . . It involves a highly controversial issue which is before us in the resolutions . . . with reference to the garment industry . . . and it deals with the question as to whether unionization of contractors who do work which is farmed out to them . . . shall come under the inhibition of the provisions [of Section 8(e)] of this new labor bill which would prevent unionization from taking place by agreement with the jobber who farms out the work . . .

* * *

". . . This is a long-standing course of business in the clothing industry . . .

* * *

". . . it is readily felt that the elimination of sweatshops in these two industries [garment and men's apparel fields] is heavily attributable to this method of proceeding to unionization . . ."

105 Cong. Rec. 6668, 15951-52, II Leg. Hist. 1384-85 (1959). Senator Goldwater, one of the conferees, responded:

". . . We conferees are in the very peculiar position of everyone of us agreeing that we do not intend to upset the status quo of the garment or apparel industries. . . ."

". . . none of us wants to disturb . . . the status the garment trade now occupies under the present law. . . .

". . . we have tried to develop language to take care of this situation which all of us are sincerely interested in taking care of. . . ."

105 Cong. Rec. 15952, II Leg. Hist. 1385 (1959).

As can be seen from the text of Section 8(e), Congress developed that language, and exempted garment industry "cease doing business" agreements, especially subcontract-

ing agreements, from the general Section 8(e) ban in order to permit their continued use for organizational purposes.

Congress did not reach the same result or utilize the same reasoning with respect to construction industry employers and their "cease doing business" agreements.

"In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from §8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 630 (1975). Like the garment industry proviso, the construction industry proviso was added to Section 8(e) in the Conference Committee. Neither the Senate Bill nor the House Bill had contained an exemption. The addition of the proviso was a result of the compromise effectuated in the Conference Committee with respect to the Senate conferees' insistence that the final bill contain a provision dealing with "common-situs" picketing so as to overrule this Court's decision in *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675 (1951). It was ". . . a partial substitute . . ." therefor. *Connell Construction Co. Inc. v. Plumbers & Steamfitters Local 100, supra.*

As to the use of subcontracting agreements as organizing tools for construction unions, "[T]he silence of the sponsors of [the] amendments is pregnant with significance." *NLRB v. Fruit & Vegetable Packers (Tree Fruits Organizing Committee),* 377 U.S. 58, 66 (1964). The silence in the legislative history concerning the use of subcontracting agreements as organizing tools for construction unions lends support to the view that the intent was otherwise. Indeed, since the provisos for the garment and construction industries served different purposes, Senator Goldwater remarked:

> "The exception for the construction industry is only a partial one."

105 Cong. Rec. Appendix A8357, II Leg. Hist. 1827, 1829 (1959). (Extension of Remarks of Hon. Barry Goldwater.)

The construction industry proviso was not explained by Congressional remarks indicating a need for or an interest to preserve building trade union methods of organizing workers from the "top down" by subcontracting agreements. Rather, the construction industry proviso was contained in the *Denver Building Trades* picketing proposal, and linked only to "on site" work on those construction jobsites where common-situs interests were involved. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 629 n.8 (1975).

D. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) RELATES ONLY TO COMMON-SITUS RELATIONSHIPS ON PARTICULAR JOBSITES

Although the construction industry proviso was not intended to sanction secondary agreements for union organization, it was intended ". . . as a partial substitute for an attempt to overrule . . ." *Denver Building Trades,* inasmuch as the proviso emerged from the Conference Committee having gone into the Committee as part of a common-situs proposal. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 629. The "special problems" in the construction industry upon which the common-situs proposal focused related to the perceived inequities of a construction union not being able to picket a non-union employer at a construction site where more than one employer was simultaneously performing work.

In *Denver Building Trades, supra,* the Court held that the inducement of a complete work stoppage at a common construction jobsite, simply because of the union's dispute there with one non-union employer, was violative of Section 8(b)(4) of the Act. The union had been motivated by a desire to enforce its internal policies against union men working

alongside non-union men at the same jobsite and sought to have those union men cease working alongside the non-union men. *See Denver Building Trades, supra,* 341 U.S. at 692 (Douglas, J., dissenting).

The literal words of the construction industry proviso do not expressly reveal or suggest that to be within the proviso agreements must be related to *Denver Building Trades* policies.

> "This Court has held, however, that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment:
>
> > 'It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church v. United States,* 143 U.S. 457, 459.' *National Woodwork Mfrs. Assn. v. NLRB,* 386 U.S. 612, 619 (1967)."

Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra. In *National Woodwork Mfrs. Ass'n v. NLRB, supra,* this Court remarked:

> ". . . the construction proviso . . . was intended to be, a measure designed to allow agreements pertaining to certain secondary agreements on the construction site because of the close community of interests there . . ." *Id.,* 386 U.S. at 611-12.

The Court, in making this remark, referenced a decision of the Court of Appeals for the Third Circuit, *Essex County and Vicinity Dist. Council of Carpenters v. NLRB,* 332 F.2d 636 (3rd Cir. 1964), which decision itself focused on the nature of the "close community of interests" at a construction common-situs:

> "This limited exemption was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal

of craft unionists to work alongside non-union men on the same project." *Id.* at 640.

That this was the proviso's intended purpose is demonstrated by the limitation of the proviso to agreements only affecting work on a *jobsite* which is the location of these sporadic work stoppages and the location of common-situs relationships.[11] This reasoning as to the proviso's purpose is shared by the Board and, until now, most Courts of Appeal.

In *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1974), the union contended that contractual restrictions on the contracting out of on-site heavy equipment repair work were privileged by the proviso because such work was to be done at the jobsite. The Court rejected the union's argument and stated:

> "Although the legislative history of the proviso is ofttimes vague and inconclusive what does emerge is an underlying *Congressional concern with minimizing jobsite tension*. In contrast to most other industries, a variety of craftsmen employed by different contractors and subcontractors work continuously side by side on construction projects. Where the employees of some are union members and employees of others are not, there is a potential, or so Congress believed, for jobsite conflict. Hence, '*the purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site*.' What appears critical is that the potential for conflict is likely to arise only when the non-union laborers are in frequent and relatively close contact with the union craftsmen." *Id.* at 851 (emphasis added).

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[11]The construction industry proviso's purpose was otherwise alluded to by Senator Kennedy on the floor of the Senate in explaining the Conference Report only by a bare reference to "avoiding damage" to collective-bargaining in that industry. 105 Cong. Rec. 17899, II Leg. Hist. 1432 (1959)

Accord, International Union of Operating Engineers, Local 542 (York County Bridge), 216 N.L.R.B. 408, 409 (1979), *enforced*, 532 F.2d 902 (3d Cir. 1976) ("The 8(e) proviso was intended to prevent labor strife among non-union and union employees at the same jobsite"); *Drivers, Salesmen, etc., Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966) ("The purpose of the Section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site"); *Associated General Contractors of California, Inc. v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and non-union employees on the same jobsite").

In sum, the legislative history of the proviso's enactment, the past interpretation by the Board, by the Courts of Appeal, and by this Court all reflect that the proviso's purpose was limited to common-situs interests on particular jobsites where union and non-union workers work side-by-side. In keeping with this reasoning, the proviso's sanction for on-site contracting restrictions cannot be broader than the reason for the proviso's enactment.[12]

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[12]In *Connell*, the Supreme Court noted that it had stated that the proviso was "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the *close community of interests* there. . . .," and that other courts had suggested that the proviso's purpose was narrower: ". . . to alleviate the *frictions that may arise when union men work continuously alongside non-union men on the same construction site*. . . ." 421 U.S. at 629.

Obviously, the "close community of interests" referred to by the Court, includes the narrower "shoulder-to-shoulder" purpose. However, the "close community of interests" purpose is no broader than the purpose behind the 1959 Congressional proposals to overrule *Denver Building Trades*, *see* 421 U.S. at 629, and is no broader than the protection of the common interests shared by all workers at the common situs — ". . . they *work side by side and the wages and working conditions of one trade effect all the others*." II Leg. Hist. 1577 (1959).

Accordingly, the proviso's sanction is clearly no broader than the protection of the union's interest in preventing *jobsite tension* between union and non-union workers over their union versus non-union status or their working conditions when and where they are working side-by-side.

E. THE PROPER INTERPRETATION OF THE CONSTRUCTION INDUSTRY PROVISO MUST ACCOMMODATE BOTH THE CONGRESSIONAL DESIRE TO LIMIT TOP-DOWN ORGANIZING IN THE CONSTRUCTION INDUSTRY AND TO PERMIT COMMON-SITUS SUBCONTRACTING RESTRICTIONS

1. The Proviso Must Be Construed in Pari Materia With Other Congressional Desires

Cognizant of the interests affected by Section 8(e), Congress carefully tailored the construction industry proviso so that it would not affect other provisions of the law then being enacted. *See Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra.* Hence, Section 8(e) and its construction industry proviso must be construed *in pari materia* with the other sections of the statute. As shown earlier, Congress did not intend that construction unions could use subcontracting clauses for top-down organizing purposes, although garment industry unions were free to do so. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 634 n.13.

In view of the reason for its enactment and the simultaneous Congressional concern to limit top-down organizing, the construction industry proviso sanctions *only* those provisions, otherwise within the scope of the general proscription of Section 8(e), which are related to the alleviation of the frictions which may develop at a *particular* common-situs construction project between union and non-union workers, and which do not have broad top-down organizing effects.

Although Congress did not clearly define what specific subcontracting agreements are within the ambit of the proviso, it did not clearly indicate which such agreements were lawful at the time, or would be in the future. The House Conference Report, in detailing the Conference Committee's action with respect to the proviso merely stated "... that the proviso relates only and exclusively to the

contracting or subcontracting of work to be done at the site of the construction . . ." H.R. No. 1147 on S.1555, 86th Congress, 1st Sess., II Leg. Hist. 934, 943 (1959). As to the effect of the proviso on the validity of such restrictive subcontracting arrangements, the Conference Committee was careful to point out that it did ". . . *not intend that this proviso should be construed so as to change the present law* with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project. . . ." *Id.*

The proviso did not then, *ipso facto*, legalize all subcontracting provisions. It was only those provisions relating to common-situs interests and on-site work which were then legal which the proviso was intended to keep from being affected by Section 8(e) illegality. ("To the extent that such agreements are legal today under Section 8(b)(4) . . . the proviso would prevent such legality from being affected by section 8(e). . . ." *Id.*) All the proviso may have done, therefore, was to preserve the then present state of the law as to such agreements without legalizing such agreements if then unlawful. Senator Kennedy, in explaining the proviso as agreed to in conference remarked:

> "The . . . proviso . . . is intended to preserve the present state of the law with respect to . . . the validity of agreements relating to the contracting of work to be done at the site of a construction project."
>
> "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor *appear to be* legal today. They will not be unlawful under Section 8(e) . . ."
>
> ". . . It is not intended to change the law with respect to the judicial enforcement of these contracts. . . ."

105 Cong. Rec., 16415, II Leg. Hist. 1433 (1959).

At no time did Congress indicate that it sought to preserve or legalize broad top-down organizing Subcontractor Clauses, however.

2. The Subcontractor Clauses Herein Do Not Relate to the Proviso's Purpose

The Subcontractor Clauses involved in Woelke & Romero's situation are not closely related or limited to the Congressional goals in enacting Section 8(e)'s construction industry proviso. Their broad top-down organizing reach and their failure to be limited to common-situs relationships on those particular jobsites where union v. non-union worker friction may occur, reveals that these clauses are outside the protective ambit of the proviso. The clauses seek to organize not only Woelke & Romero's potential subcontractors, but even the subcontractors of their subcontractors. The clauses name the particular union with which the subcontractors', and their subcontractors', employees must designate as their bargaining representative. The clauses are not limited to any particular common-situs jobsite where the Carpenters Unions might have an identifiable dispute, but apply to *all* future jobsites for the duration of the agreement. The clauses are not limited in language or effect to protecting Woelke & Romero's employees from having to work alongside non-union workers; they allow free subcontracting of all work other than carpenters' work, leaving open the possibility that Woelke & Romero's employees might be employed alongside non-union workers. The clauses do not restrict Woelke & Romero from accepting work at jobsites at which non-union workers might be employed.

It would be unfaithful to the dual Congressional objectives of limiting top-down organizing and permitting secondary agreements limited to common-situs relationships to hold that the Subcontractor Clauses here are sanctioned by the proviso.

3. This Court in *Connell* Sensitively Balanced the Dual Congressional Objectives

This Court's decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* supports, not detracts from, this view. There, this Court was sensitive to the dual Congressional objectives, and achieved a proper balance between them.

In *Connell,* the union (Local 100) demanded that Connell, a general contractor, execute an agreement which would have required that Connell subcontract its plumbing mechanical work only to firms which had agreements with Local 100. When Connell refused to execute the agreement, Local 100 picketed Connell's jobsite to compel its execution. Connell did not normally perform plumbing mechanical work with its own employees, and Local 100 expressly disclaimed any interest in representing Connell's employees. Local 100 sought only a subcontracting agreement from Connell.

This Court, when presented with the question of whether the subcontracting agreement fell within the protection of the construction industry proviso to Section 8(e) of the Act, held that although the agreement appeared privileged by the proviso's words, the agreement was *not* so privileged because the proviso was not intended to protect such clauses:

> "[W]e think its [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of Congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships or particular jobsites as well."

Id., 421 U.S. at 633. The Court did not believe that Congress meant to privilege such subcontracting provisions which were literally within the words of the construction industry proviso *if* those provisions were either outside the context of a lawful collective-bargaining relationship, or directed toward, or had the effect of, organizing the con-

tractor's subcontractor's employees from the "top down." The Court stated:

> "If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with 'stranger' contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon and the unions would be free to enlist any general contractor to bring economic pressure on non-union subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.
>
> "It is highly improbable that Congress intended such a result. One of the major aims of the 1959 act was to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees."

421 U.S. at 631-32.

Connell balanced the competing interests and dual Congressional objectives, and sought to reach an interpretation which best served to effectuate the dual Congressional policies. The fact that the subcontracting agreement was sought "outside" the context of a collective-bargaining relationship demonstrated the breadth of the boycott and the reach of the top-down organizing effect of the clauses. The Court was sensitive to the common-situs interests to be preserved by the proviso, but found none of them furthered by the subcontracting agreement involved. *Id.* at 631.

4. The Board and Court Below Misinterpreted This Court's *Connell* Decision

The errors of the Board and the *en banc* Court below are the failure to recognize and properly apply these balanced interests and Congressional objectives to the Subcontractor

Clauses involved here.[13] The Board rejected the application of this Court's *Connell* decision merely because Woelke & Romero had a collective-bargaining relationship with the Unions. (Pet.App.C., pp. 97-98.) Similarly, the *en banc* Court below concluded that the mere existence of a collective-bargaining relationship automatically privileges such a clause because of the interests of the employees of the employer in maintaining area-wide contract and benefit standards. (Pet.App.A, pp. 23-29.)

Where the employer which is party to a Subcontractor Clause employs no workers at the particular jobsite, the union party to the Clause has no proviso-protected interest. There are no union-represented workers on the common-situs to protect from the frictions which might arise from the simultaneous employment there of unrepresented workers. In that circumstance, the union is as much a "stranger" to the employer as was the union to Connell.

The existence of a collective-bargaining relationship between the employer and the union does not automatically privilege a union-signatory Subcontractor Clause. The presence or absence of union-represented workers at a particular common-situs, is *the* relevant fact. Thus,

> "The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are re-

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[13]The decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, ____ U.S. ____, pet. for rehearing pending, No. 80-1257, is in error for the same reason. Like the *en banc* Court below, the fatal flaw in that Court's decision is its reliance upon the notion that Congress meant the proviso to preserve a pattern of collective-bargaining in the construction industry which assertedly contained broad subcontracting clauses, and to protect area-wide contract standards. *Id.* at 871 and 880.

> lated. It is not sufficient that the restraint serves the interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer." *Pacific Northwest Chapter of ABC v. NLRB, et al.*, 654 F.2d 1301, 1328 (9th Cir. 1981) (Farris, J., dissenting) (Pet.App.A., p. 51.)

The *en banc* Court below justified its conclusion by noting that the Subcontractor Clauses served such union interests as ". . . maintaining wage levels . . . [and] protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions . . ." (Pet.App.A., p. 27.) This justification misconstrues the proviso's limited purpose, and grants to these Subcontractor Clauses a legality not directly related to even the interests specified. The proviso was not enacted to permit unions to maintain area-wide wage levels or benefits unrelated to common-situs interests on particular jobsites. Such interests are "primary" interests which can be protected by provisions directly related to the labor relations of the contracting employer *vis-a-vis* his own employees. Such interests are not ones protected by the proviso because contract provisions involving them would not be within the "secondary" scope of Section 8(e) to which the proviso is an exception. *General Teamsters, Local 386 (Construction Materials Trucking, Inc.)*, 198 N.L.R.B. 1038 (1972); *National Woodwork Mfrs. Ass'n v. N.L.R.B., supra;* see *Local 437, IBEW, et al. (Dimeo Construction)*, 180 N.L.R.B. 420 (1969); *NLRB v. Enterprise Ass'n., Pipefitters, supra*. The interests can be preserved by the parties, through collective bargaining, negotiating provisions which (1) prohibit the subcontracting of work or (2) limit the economic incentive for subcontracting by imposing a requirement on a subcontractor that he maintain total wage-benefit labor costs equivalent to those in the contractor's union agreement.

Further, the *en banc* Court's legitimation of the Subcontractor Clauses permits the vice both Congress and this Court in *Connell* meant to restrict: broad top-down organizing in the construction industry. If the maintenance of contract industry standards needs to be protected, it can be done without either massive area-wide, *in futuro*, boycotts against those employees who prefer not to be represented by a particular union, and their employers, or top-down organizing benefiting the particular union involved.

In order to give credence to the dual objectives of curbing top-down organizing and permitting secondary objective agreements with respect to on-site construction work, a Subcontractor Clause must be carefully tailored in its language, and in its use. These objectives are met only when the clause (1) operates only at a particular jobsite at which union and non-union workers would otherwise work side-by-side, (2) does not name the specific union which must be designated by the theretofore unrepresented workers, (3) does not operate *in futuro* at projects not begun, (4) is in the context of a majority collective-bargaining relationship at the particular jobsite so that the unionized workers can be said to desire the union's protection as to their jobsite interests, (5) does not extend to contractors other than the contractor with whom the union has that relationship, and (6) is not obtained by picketing or other coercive means. Where the clause is broader, it must be considered "outside" the intent of Congress, not protected by the proviso and unlawful under Section 8(e).

Nor are the "practical consequences" identified by the *en banc* Court below justifiable reasons for another conclusion. The practical consequences feared by the Court are: (1) unions would have to ". . . inventory and negotiate over an incredible number of jobsites . . .", which would be ". . . burdensome to the point of impossibility . . .", and (2) ". . . enforcement problems remain severe . . ." be-

cause of the transitory nature of work and a perceived motive for anti-union discrimination. (Pet.App.A, pp. 37-39.)

Neither concern is realistic. The Carpenters Unions in Southern California already must inventory and negotiate with hundreds of employers. (J.A., Vol. I, p. 22.) Policing of compliance with "particular jobsite" clauses would not be that much more burdensome. Further, the collective-bargaining agreement may provide for the contractor to hold a pre-job conference and advise the union of its intention as to subcontracting. Indeed, the old and proposed agreement the Carpenters Unions sought from Woelke & Romero provided *exactly* that. (J.A., Vol. I, pp. 63-64.)

Enforcement problems are likewise more illusory than real. Grievance procedures and arbitration may be utilized to enforce the day-to-day relationship concerning subcontracting, and the Unions' jobsite stewards may be utilized to advise the Union agents of possible impending problems. Such, again, were exactly what the old and proposed agreements provided in Woelke & Romero's case. (J.A., Vol. I, p. 84; R. pp. 51-52.)

Finally, the *en banc* Court should not assume that an employer will flagrantly violate Section 8(a)(3) of the Act by discharging union-represented workers because of their "union" status simply to permit the employer to subcontract work to others. In any event, such discrimination is rectifiable by the union or the employee before the Board.

In short, the parties in collective-bargaining are, or can be, ingenious enough to resolve these perceived problems.

The bottom line of the foregoing analysis is that the mere ". . . existence of a collective-bargaining relationship . . ." *does not clearly* bring ". . . a union-signatory subcontracting agreement within the proviso . . ." as the majority of the *en banc* Court below held. (Pet.App.A., p. 36.)

F. UNIONS MAY NOT COERCE EMPLOYERS TO OBTAIN PROVISO-PROTECTED SUBCONTRACTOR CLAUSES

The *en banc* Courts' decision sustains the Board's view that a construction union can utilize strikes and picketing to obtain a Subcontractor Clause if that agreement is otherwise protected by the construction industry proviso to Section 8(e) of the Act. (Pet.App.A, pp. 40-41.) This conclusion of both the Board and the Court of Appeals is contrary to the legislative history behind the enactment of the proviso and Section 8(b)(4)(A) of the Act, and to common sense. Moreover, this conclusion permits top-down organizing to take place through picketing, clearly contrary to the admonitions previously articulated by this Court.

In this regard, in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* this Court acknowledged the contention that the proviso to Section 8(e) of the Act was intended to permit only *voluntary* jobsite subcontracting agreements. In view of its holding that the agreement there was outside the proviso, this Court did not reach the issue. *Id.*, 421 U.S. at 634 n.14. The foundation for this contention was that Congress intended Section 8(b)(4) of the Act to forbid such picketing. *Id.*

Subsequent to the 1959 congressional amendments which added Section 8(e), its proviso, and a modified Section 8(b)(4)(A) to the Act, the Board construed the legislative history to these Sections to mean that Section 8(b)(4) outlawed *all* picketing or economic coercion designed to force an employer to enter into union-signatory Subcontractor Clauses, even those otherwise protected by the proviso. *Construction, Production, and Maintenance Laborers Union, Local 383 (Colson and Stevens Construction Co., Inc.),* 137 N.L.R.B. 1650 (1962), *enf. denied,* 323 F.2d 422 (9th Cir. 1963). The Board's position in *Colson and Stevens* was fairly straight-forward. It found support in the Conference Report to the House dealing with the enactment of the proviso to Section 8(e) for the proposition that Congress in-

tended for the proviso to permit only voluntarily-entered subcontracting agreements. In the Board's view, if such were entered into involuntarily, they were prohibited by Section 8(e) and the coercion used to exact them would be within the literal proscription of Section 8(b)(4)(A) of the Act. *Id.*, 137 N.L.R.B. at 1651-52.

The circuit courts which considered the issue shortly thereafter disagreed with this view. *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963). The Board subsequently agreed with those courts that since Section 8(b)(4)(A) referred to only "agreements prohibited by Section 8(e)," the construction proviso was incorporated by that reference. It, thus, literally permitted picketing and strikes to force a construction employer to agree to a proviso-protected subcontracting clause. *Northeastern Indiana Building and Construction Trades Council (Centrilivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

The prohibitions on the use of coercion to exact "hot cargo" agreements in Section 8(b)(4)(A) emanated from the compromise effectuated in the Conference Committee when the provisos to Section 8(e) and the modifications to Section 8(b)(4) were added. The Senate Bill had contained no modifications to Section 8(b)(4), but did contain restrictions on the entering into of "hot cargo" agreements in the trucking industry. The House Bill contained both a modification to 8(b)(4) and the provision outlawing "hot cargo" or "cease doing business" agreements in *all* industries. The Conference Committee, as noted earlier, added the garment and construction industry provisos to Section 8(e), thereby exempting from Section 8(e) certain secondary "cease doing business" agreements. The Conference Committee, in re-

writing the language of the differing bills, deleted the reference then contained in Section 8(b)(4)(B) of the House Bill prohibiting coercion to force an employer "to agree to cease" doing business with another, and added that language, in different form, to Section 8(b)(4)(A). The House Report on the Conference Committee's work states:

> "The conference committee adopted the provisions of the House amendment [to Section 8(b)(4)] with the following changes: (1) the phrase 'or agree to cease' was deleted from Section 8(b)(4)(B) because the committee of conference concluded that the restrictions imposed by such language were included in the other provisions dealing with prohibitions against entering into 'hot cargo' agreements, and therefore their retention in Section 8(b)(4)(B) would constitute a duplication of language." H.R. No. 1147 on S.1555, 86th Cong. 1st Sess., II Leg. Hist. 942 (1959).

Senator Kennedy, in explaining portions of the Conference Committee's report prior to passage of the 1959 amendments, stated:

> ". . . the [construction industry] proviso does not relate to Section 8(b)(4) . . ." II Leg. Hist. 1433 (1959).

The sense of Congress, then, was that Section 8(b)(4) was not to be affected by the construction industry proviso, or by the change in the subsection location as to the prohibition of coercion to obtain "hot cargo" agreements. Coercion, it seems, was not to be permitted with respect to proviso-protected agreements.

In explaining the Conference Report to the House dealing with the enactment of the proviso, Representative Barden, one of the conferees, stated:

> ". . . The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or sub-

contracting of work to be done directly on the site of construction." II Leg. Hist. 1715 (1959) (emphasis supplied).

Although the foregoing is by no means a clear expression that Congress meant to ban coercive conduct to obtain proviso-protected agreements by Section 8(b)(4)(A), the clear intent of Congress to legalize such conduct is also not readily apparent. But, the Conference Report to the House states: "It is not intended that the [construction industry] proviso change the existing law . . . with respect to the legality of a strike to obtain such a contract." H.R. No. 1147 on S.1555, 86th Cong., 1st Sess., I Leg. Hist. 943-944 (1959).

The proviso, of course, could only have changed the law if such activity had been theretofore unlawful. It was. Prior to the passage of the 1959 amendments, the Board had held that picketing to obtain a Subcontractor Clause was illegal under Section 8(b)(4). *See, e.g., Local 47, Teamsters (T. C. Bateson Construction Co., and Texas Industries)*, 112 N.L.R.B. 923 (1955), *enforced*, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 N.L.R.B. 484 (1959), *enforced*, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons, etc. (Selby-Battersby & Company)*, 125 N.L.R.B. 1179 (1959).

Consequently, it appears that Congress did not intend for Section 8(b)(4)(A) to be construed to overrule that body of law by permitting construction unions to picket to obtain binding agreements not to deal with non-union firms for

work at construction sites.[14] Although the literal words of Section 8(b)(4)(A) might appear to privilege union strikes to obtain Subcontractor Clauses, this Court has indicated ". . . that §8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. . . ." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 628. The same must be true regarding Section 8(b)(4)(A). The circumstances surrounding that section's enactment show that Congress did not clearly express the view that restrictive secondary subcontracting agreements could be obtained by picketing. In addition, it would be anomalous to conclude that the body of Section 8(b)(4)(B) prohibits picketing of neutral employers to achieve a "cease doing business" objective, but that Section 8(b)(4)(A) permits such conduct as long as the union seeks a written agreement which has the same effect, unless Congress had clearly so intended.

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[14]Senator Goldwater noted:

> "Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint — economic or otherwise — may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel or to refrain from breaching it.
>
> "The new provision is silent with respect to the lawfulness of coercion or restraint — economic or otherwise — by one party to compel the other party to enter into, or even to bargain about entering into such an agreement. This question was one of those left unresolved by the Board and the courts under Taft-Hartley prior to this new legislation, but now specifically outlawed in all situations not falling within the exemption for the clothing and apparel and construction industries. It is the intention of Congress that the new legislation leave it in the same unresolved status under the building construction industry exemption and that the Board and the courts decide the issue for the building construction industry as if these new amendments contained in section 8(e) had not been enacted and in accordance with the previously applicable law."

II Leg. Hist. 1858 (1959) (Extension of Remarks of Sen. Goldwater).

Further, this Court's decision in *Local 1976, Carpenters Union v. NLRB (Sand Door)*, 357 U.S. 93 (1958) indicates that before the enactment of Section 8(e) and the proviso, coercion could not be utilized to exact "hot cargo" agreements. In its *Sand Door* decision, this Court, in construing whether or not the existence of hot cargo provisions in a collective-bargaining agreement privileged a union to induce a work stoppage to effect a secondary boycott, held that such hot cargo provisions could not be so used. The Court noted that a voluntary employer boycott does not become prohibited simply because of the existence of a hot cargo clause in a collective-bargaining agreement. *Id.*, 357 U.S. at 107. However, the Court stated that an employer must be free to decide whether or not to observe the hot cargo provision in the contract at the time the question of whether to boycott or not arises. *Id.*, 357 U.S. at 105. Most significantly, the Court indicated that a union could not rely upon such provisions to induce a boycott because the contractual provisions may not have been entered into voluntarily. The Court stated:

> ". . . the contractual provision itself may well not have been the result of the choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision might be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." *Id.*, 357 U.S. at 106.

As noted earlier, the 1959 Congress intended to plug the "hot cargo" agreement loophole, and it is unlikely that Congress intended to create another at the same time.

Finally, adherence to the rule by the Board and by the *en banc* Court below which allows construction unions to picket to obtain such Clauses permits a construction union to do that which this Court in *Connell* stated was contrary to congressional intent: to use broad subcontracting agreements as top-down organizing tools by seeking subcontracting agreements from any contractor vulnerable to picketing. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra.* Here, the Unions are and have been at liberty to strike and picket Woelke & Romero because the latter would not agree to take part in the Unions' top-down organizing inherent in agreeing to the Subcontractor Clauses. Woelke & Romero is now, and has been, powerless to resist the Unions' coercive pressure except by executing an agreement containing the Subcontractor Clauses. Section 8(b)(7) of the Act, 29 U.S.C. §158(b)(7), affords no remedy, contrary to the implication of the *en banc* majority below (Pet.App.A, p. 36) inasmuch as that Section applies only to picketing for the purposes of acquiring *initial* union recognition and not to picketing in furtherance of contract demands during an existing bargaining relationship. *NLRB v. Local 103, Iron Workers,* 434 U.S. 335 (1978). The Unions' coercion for the requested top-down organizing agreement is, therefore, unlimited and unrestrained: even though Woelke & Romero had a bargaining relationship with the Unions and did say "No" to them when it was asked to sign a contract containing those provisions, it subjected itself to unrestrained picketing pressure to force it to so agree as a penalty for not agreeing to boycott firms which were unorganized by those particular Unions. This Court has doubted that Congress intended for construction unions to have such unrestrained power. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100, supra,* at 631-32.

CONCLUSION

The interpretation of the sanction of the construction industry proviso to Section 8(e) of the Act by the Board and the *en banc* Court of Appeals fails to give sufficient credence to and misinterprets the decision of this Court in *Connell*. Here, the subcontracting provisions on their face are broader than the sanction of the proviso. They are, or should be held to be, illegal under Section 8(e) of the Act.

Congressional concern for the elimination of broad top-down organizing weapons must be balanced against the construction union's interest in protecting its represented workers on the construction site. But, the only legitimate union interest for Subcontractor Clauses under the proviso is to protect union members from having to work alongside non-union workmen at a common construction site. Unless the Subcontractor Clauses in this case are invalidated, they clearly may be used for top-down organizing purposes, purposes other than the legitimate, but narrow, union interest Congress intended to validate.

In sum, Petitioner respectfully suggests that the Subcontractor Clauses here are not privileged by the proviso to Section 8(e), and that the Unions' strike and picketing to obtain them violated Section 8(b)(4)(A) of the Act. In any event, since Section 8(b)(4)(A) reaches even proviso-protected provisions, the Union's coercive efforts to obtain the Clauses violated the Act.

The Court of Appeals' decision should be reversed, and the matter remanded for the entry of an appropriate Order directing the Unions to cease and desist from their conduct, and directing them not to engage in such like or related conduct against Woelke & Romero, or any other firm.

Newport Beach, California.

Dated: November 19, 1981.

Respectfully submitted,

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Nos. 80-1798, 80-1806, and 81-91

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BRIEF FOR RESPONDENT UNIONS

This brief is submitted jointly by all the respondent unions in these consolidated cases and by American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which those unions are affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire to minimize the burdens on the Court by stating their common position only once.

STATUTE INVOLVED

This case involves §§ 8(b)(4) & 8(e) of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 141 *et seq.* These provisions are reproduced in pertinent part in the appendix hereto.

STATEMENT OF THE CASE

We accept the statement of the case in the brief of the National Labor Relations Board (hereafter "the Board").

SUMMARY OF ARGUMENT

I

The principal issue in this case is the meaning of the construction industry proviso to § 8(e) of the National Labor Relations Act, which was added to the Act in 1959. Petitioners and the *amici* on their side contend that this proviso protects only agreements negotiated on a job-site-by-job-site basis. This is wholly inconsistent with the language and legislative history of the Act, which make clear that all agreements relating to subcontracting of work on a construction site entered into within the context of a collective bargaining relationship are protected by the proviso. Moreover, petitioners' reliance on *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, is misplaced because that decision involved, and its holding is limited to, agreements between a union and a contractor entered into *outside* a collective bargaining relationship.

A. We begin, of course, with the language of the proviso, which provides that "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure or other work." The agreements challenged in this case unmistakably fit within this language.

B. We show next from the legislative history of the proviso that Congress intended to preserve the legality of agreements such as those here. The construction industry proviso, and a somewhat broader proviso concerning the apparel and garment industry, originated in the Conference Committee which was charged with compromising a disagreement between the House and the Senate concerning the scope of the prohibition of "hot cargo" clauses. The Senate bill had outlawed such agreements only in the trucking industry, and the House bill had outlawed them generally. The Senate Conferees insisted that such agreements relating to work on a construction site be excluded from this prohibition. Accordingly, the explanations of the proviso in the Conference Report, and by Senator Kennedy, the Chairman of the Senate Conferees, explaining the Conference Bill to the Senate, are authoritative and controlling explanations of the proviso. Both the Conference Report and Senator Kennedy's statement state expressly that the purpose of the proviso is to preserve the legality of agreements relating to job site work in the construction industry. 1 Leg. Hist. 943; 2 Leg. Hist. 1433. In Senator Kennedy's words:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. [2 Leg. Hist. 1433.]

Senator Kennedy also said that the Senate's insistence upon the qualification of § 8(e)'s prohibition "for agreements relating to work to be done at the site of a construction project" was "necessary to avoid serious damage to the pattern of collective bargaining in th[is] industr[y]." 2 Leg. Hist. at 1432.

The law in 1959 was, and Congress recognized it to be, that agreements like those at issue in this case were

lawful. See *Carpenters' Union v. Labor Board*, 357 U.S. 93 (*Sand Door*) (which gave rise to the move to outlaw "hot cargo" clauses by holding that hot cargo agreements were lawful under the pre-1959 act) and *Northern California Chapter, the Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 NLRB 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 864 (regarding which extensive testimony had been given at the House Committee hearings which was studying labor legislation, including legislation on the problems in the construction industry). We also show, on the basis of a 1961 study that agreements like the present were well-known in the construction industry as of 1959.

Petitioners and the *amici* on their side have not been able to point to anything in the legislative history which contradicts the Conference Report or Senator Kennedy's statement. Nor have they shown that such agreements were illegal, or that they were not prevalent in the industry.

Rather, petitioners argue that the exclusive purpose of the proviso was to eliminate the "*Denver Building*" problem and that the *Denver* problem is confined to the friction between union and non-union workers on a construction job site. We show that petitioners are wrong in both respects. As to the latter point, the central problem created by *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, is that the decision treats each of the contractors on a construction site as a separate person for purposes of the secondary boycott provision of the Act (§ 8(b)(4)). One result of this holding, as the dissent in that case points out, is that union and non-union workers might be required to work on the same job. But that is by no means the only consequence of the decision which the construction unions have considered to be seriously adverse to their interests: the basic problem, as they saw it from the first, is that construction unions

cannot picket a general contractor (or a subcontractor) to preserve their wages and working conditions.

In studying the *Denver Building* problem, the Conferees agreed that the unity of all the contractors on a construction project should be recognized in applying the secondary boycott provision, and it was therefore proposed that the Conference Bill would amend the Act to overrule *Denver Building*. A parliamentary problem prevented that course of action. However, the Conferees did act on their view of *Denver Building's* basic error by refusing to extend its holding by a § 8(e) prohibition of all secondary agreements between unions and contractors regulating the labor conditions of subcontractors. The Conferees, at the Senate's insistence, added the construction industry proviso to preserve the legality of such agreements.

The history of the legislation prior to the Conference indicates also that Congress' preception of job and employment practices in the construction industry was considerably informed by its study of hiring arrangements which led to the enactment of § 8(f). We show that subcontracting restrictions of the type involved here are necessary to protect the work standards of union employees in the industry, because, as Congress well knew, such employees are not attached to a particular employer, but to the industry generally. Moreover, unions could not protect their work standards by absolute prohibitions on subcontracting without destroying the pattern of business relations in the industry.

In sum, while we believe it is inappropriate to look behind the unqualified and authoritative explanations of the proviso in the Conference Report and by Senator Kennedy, even if that exercise is undertaken, it supports, rather than undermines, the lesson from those sources.

C. We show next that the *Connell* case does not call for a different result. That decision turned in substance on the fact that the union there sought a subcontracting restriction outside a collective bargaining relationship

between the union and the general contractor, a fact referred to repeatedly in the Court's opinion. This was a novel organizing device not part of the pattern of bargaining that the 1959 Congress intended to preserve. Moreover, that tactic did not further, as the Union in *Connell* conceded, any of the objectives of the proviso; the subcontracting restriction sought was solely a "topdown organizing" device. For that reason, the *Connell* Court thought that Congress could not have intended to permit what the union there was attempting to accomplish. *Connell* does not, however, justify striking down the agreements in this case. The agreements here are demonstrably necessary to achieve other purposes concerning the preservation of the wages and working conditions of already organized employees that Congress did intend to protect through the § 8(e) proviso. Thus, petitioners' repeated insistence that the agreements be struck down as a "topdown organizing device" is contrary to Justice Harlan's teaching in *Machinists* v. *Labor Board*, 362 U.S. 411, 428: "The policy of the Act is embodied in the totality of [Congress'] adjustment, and not necessarily in any single demand which may have figured, however weightily, in it."

II

It is contended in some of the petitioners' briefs that it is unlawful to strike for an agreement whose legality is preserved by the construction industry proviso. That issue is not properly presented because it was not part of the General Counsel's theory before the Board and because petitioners themselves did not raise it there. See §§ 3(d), 10(b) and 10(e) of the Act. And even if the claim is considered, it is without merit. It is contrary to the language of the Act and to its legislative history. Congress did not wish to change the law on this subject as it stood in 1959, and strikes to obtain "hot cargo" clauses were not prohibited by § 8(b)(4) prior to the amendment of § 8(b)(4)(A) in 1959—an amendment deemed necessary precisely to add that prohibition.

ARGUMENT

I. THE BOARD AND THE COURT BELOW CORRECTLY HELD THAT THE CONSTRUCTION INDUSTRY PROVISO TO § 8(e) OF THE NLRA PRESERVES THE LEGALITY OF ALL CONSTRUCTION INDUSTRY SUBCONTRACTING CLAUSES ENTERED INTO WITHIN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP.

A. The Agreements in This Case Are Unambiguously Within the Language of the Construction Industry Proviso.

The judicial task in this case is to interpret the construction industry proviso to § 8(e) of the National Labor Relations Act as amended. Accordingly the proper method of analysis is that stated in *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must cordially be regarded as conclusive.

In 1959, Congress added § 8(e) to the Act. That section declares it to

> be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

If that language stood alone, the agreements in the instant case governing the subcontracting of on-site construction work would be prohibited by § 8(e). However, the construction industry proviso unambiguously declares that

> nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

The agreements in this case plainly fit within every word of the foregoing language; accordingly, if these words are to be given effect, "nothing in [§ 8] (e) shall apply" to these agreements.

Petitioners[1] do not contend that the proviso's words can be read diffeerntly nor do they point to legislative

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[1] By "petitioners" we will, unless otherwise indicated, refer also to their supporting *amici*. We note, however, that the brief of *amicus* Chamber of Commerce argues only that an agreement such as those involved in the present case is unlawful if not voluntarily entered into, a point which is separately discussed in Part II of our argument.

This brief does not discuss two issues which are argued in some of the briefs on petitioners' side: (1) whether an agreement which limits subcontracting to contractors who have agreements with particular unions is within the construction industry proviso; (2) whether *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, should be overruled. We do not respond to those arguments because neither issue is properly before the Court. The latter, while raised in one of the petitions, is entirely remote from the issues in this case. *National Woodwork* decided that certain forms of subcontracting restrictions are not covered by §§ 8(b)(4) and 8(e) because they are primary, rather than secondary. In the present case it has been determined below, and it is not in dispute here, that the agreements in question are secondary and would therefore be within § 8(e) but for the construction industry proviso. Accordingly, this Court's ruling in *National Woodwork* in no way affected the decisions below. The "particular union" issue, was not raised in any of the petitions. Moreover, in light of Congress' purpose to preserve the pattern of bargaining in the construction industry, the challenge to particular union clauses which were common in 1959 was rejected unanimously both by the original panel below (609 F.2d at 1350, n.8) and by the District of Columbia Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 884-886 (hereafter "*Schriver*").

history which even suggests, let alone clearly expresses, a Congressional intent that notwithstanding the foregoing clear language of the proviso the prohibitions of § 8(e) should be applicable to the agreements here. Indeed, as we show in Point I B of our argument, the legislative history makes clear that Congress in enacting § 8(e) and its proviso did intend to preserve the legality of such agreements.

Rather, petitioners' contrary argument is that these agreements should be deemed illegal, and the proviso should be denied its natural meaning, in light of the decision in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (hereafter *"Connell"*). As we develop in Point I C hereof, the critical difference between this case and *Connell* is that the agreement which was there held to be illegal despite the proviso was not the normal subcontracting agreement entered into as part of a collective bargaining relationship familiar in 1959, but rather a novel organizing device outside any such bargaining relationship. Under those circumstances, the *Connell* Court held that the agreement served no purpose of Congress in enacting the proviso, and defeated other objectives of the Act. Accordingly, that case was one of those relatively rare occasions on which "a thing may be within the letter of the statute [but] yet not within the intention of its makers." *Connell*, 421 U.S. at 628; *Holy Trinity Church v. United States*, 143 U.S. 457, 459; *Woodwork Manufacturers*, 386 U.S. at 619. But this case is one in which the letter of the statutory language, its spirit and the intent of Congress all call for the same result. Petitioners' attempt to extend *Connell* beyond its unique context, and thereby largely eviscerate the proviso, was properly rejected by the Board, by the court below and by the District of Columbia Circuit in *Shriver* and should be rejected by this Court.

B. The Legislative History Confirms Congress' Intent To Preserve the Legality of The Agreements In This Case.

1. *The Conference Report and Senator Kennedy's Statement Are Authoritative and Controlling.*

The legislative history demonstrates beyond doubt that the sponsors of the construction industry proviso intended to protect *all* clauses in agreements whereby the parties to a collective bargaining relationship have limited the subcontracting of on-site work to "union" subcontractors. The report of the Committee on Conference stated:

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction. The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e).*[2]

Senator Kennedy, the Chairman of the Senate conferees, in describing the Conference Agreement to his colleagues likewise explained:

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[2] H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 943 (GPO 1959) (hereafter, "Leg. Hist.") (emphasis added).

The first proviso under new section 8(e) of the National Labor Relations Act *is intended to preserve the present state of the law* with respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*

This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. [2 Leg. Hist. 1433, emphasis added.]

Senator Kennedy also said:

Hot cargo: The Landrum-Griffin bill extended the "hot cargo" provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary

> to avoid serious damage to the pattern of collective bargaining in these industries. [2 Leg. Hist. 1432]

In his dissenting opinion below, Judge Sneed acknowledged that "Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases." 654 F.2d at 1326.[3] And particularly because the proviso was added to § 8(e) at the Senate conferees' insistence, and Senator Kennedy was the Chairman of the Senate conferees, the majority below, like the District of Columbia Circuit, properly gave great weight to his uncontradicted explanation of the construction industry proviso. See 654 F.2d at 1312-1313; see also 635 F.2d at 878, 879.

Thus, both the language and the authoritative explanations of the proviso (the Conference Report and Senator Kennedy's statement to the Senate) make clear that the proviso is intended to preserve the legality of on-site subcontracting agreements which were lawful in 1959. Accordingly, it is necessary to examine the state of the law on this subject as of 1959, or more precisely (although with respect to the present issue there is no difference) Congress' perception of the state of that law. See *Brown v. GSA*, 425 U.S. 820, 828; *Schriver*, *supra*, 635 F.2d at 882-883, n.30. Clearly the law was, and Congress believed it to be, that agreements which restrict subcontracting in a collective bargaining relationship between a union and a general contractor were lawful.

In *Carpenters' Union v. Labor Board* (*Sand Door*), 357 U.S. 93 (1958) Justice Frankfurter had unequivocally declared:

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[3] The other statements in the legislative history cited by Judge Sneed do not contradict what Senator Kennedy said; those statements merely give examples of conduct which would be legal under the construction industry proviso without any indication that those examples were intended to be exhaustive.

> *Certainly the voluntary observance of a hot cargo provision by an employer, does not constitute a violation of § 8(b)(4)(A), and its mere execution is not,* contrary to the suggestion of two members of the Board in the *Genuine Parts* case, *Truck Drivers Union,* 119 N.L.R.B. 399, *prima facie evidence of prohibited inducement of employees.* It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in § 8 (b) (4) (A). [357 U.S. 108.][4]

Section 8(e) was a direct response to the *Sand Door* decision. In the words of the *Connell* opinion, § 8(e) "was part of a legislative program designed to plug technical loopholes in § 8(b) (4)'s general prohibition of secondary activties." 421 U.S. at 628.[5] The bill which passed the Senate outlawed "hot cargo" agreements only in the trucking industry, but the Landrum-Griffin substitute which passed the House outlawed such agree-

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[4] Thus, the original panel of the Ninth Circuit erred when it said in the present case that "the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door.*" 609 F.2d at 1349.

[5] As this Court explained in *National Woodwork*:

> Section 8(e) simply closed still another loophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board* (*Sand Door*), 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8(b) (4) (A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under § 8(b) (4) (A). Section 8(e) was designed to plug this gap in the legislation by making the "hot

ments in all industries. *Id.* at 635-637. The Conference Committee adopted the Landrum-Griffin version except that at the Senate's insistence it added two provisos, "to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B)." *Id.* at 637-638. And as Senator Kennedy said:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). [2 Leg. Hist. 1433.]

Further evidence of the 1959 law, and Congress' view thereof is provided by the fact that the Board and the District of Columbia Circuit had specifically, prior to the amendment of the Act in 1959, sustained a subcontracting clause like those here in *Northern California Chapter, the Associated General Contractors of America, Inc., (St. Maurice, Helmkamp & Musser)*, 119 NLRB 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir., 1959), *cert. denied*, 361 U.S. 864 (hereafter *"Musser"*). That case was expressly called to Congress' attention at the hearings of the House Labor Committee by union and employer witnesses who had been involved in that litigation.[8] Petitioner Woelke is mistaken in its reliance, at p. 22 of its brief, on the minority opinion of members Rodgers and Jenkins in *Musser*, because those views were

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cargo" clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts. [386 U.S. at 634, footnote omitted.]

[8] See *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474*, Before a Joint Committee of the House Committee on Education and Labor, 86th Cong., 1st Sess. (1959) (hereafter "House Hearings") 801, 803-807, 2365-2367.

disapproved by the Board majority, and on review by the Court of Appeals. Thus, what the Court said in *Shriver* is equally true here:

> The employers in this action have not cited a single case in which a subcontracting agreement was found to be unlawful prior to 1959 by reason of the fact that the agreement was not limited to particular jobsites at which signatory union workers were employed. [635 F.2d at 879.]

In sum, the legislative history of the construction industry proviso makes clear that Congress intended to assure that agreements which, like those here, were lawful before 1959, did not become unlawful by virtue of the new § 8(e), and thereby confirms what the language of that proviso unambiguously says. Under these circumstances, there is simply no justification for searching out a narrower purpose, and if one is found, confining the scope of the enactment on that basis, rather than according the proviso the full effect as declared by its sponsors and never denied by any other legislator. To do so would be to render unlawful by virtue of § 8(e) agreements which were lawful before that section was enacted, contrary to what the Conference Report and Senator Kennedy said would be the effect of the proviso, and contrary to its language. Nevertheless, petitioners' basic position is that the proviso is to be construed to encompass only agreements which accomplish what petitioners declare to be its specific purpose: They portray the purpose of the proviso as being limited to the "*Denver Building*" problem, and then in turn, reduce that problem to jobsite friction between union and nonunion workers. In the next two sections of our argument we show that petitioners misstate both the proviso's purpose and the 1959 Congress' understanding of the nature and extent of the "*Denver Building*" problem. Thus, the path which petitioners invite the Court to take is not only an impermissible approach to statutory construction, it is one which when followed, does not lead to the conclusion they assert.

2. *The True Nature of the* Denver Building *Problem.*

The "*Denver Building* problem" refers, of course, to this Court's decision in *Labor Board v. Denver Bldg. Council*, 341 U.S. 675. Petitioners would have it that the "*Denver Building*" problem is confined to friction between union and nonunion workers on a construction jobsite, a point addressed by Justice Douglas' dissent in the *Denver Building* case, and by some post-1959 Court of Appeals opinions.[7] But such friction is only *one* consequence of the Court's holding in *Denver Building* that the general contractor and each subcontractor are to be deemed separate persons for the purposes of the secondary boycott provisions of the Act with the result, as in *Denver Building* itself, that a strike against the general contractor to compel him to cease doing business with subcontractor is a violation of § 8(b)(4). See 341 U.S. at 689-690. Thus, this Court said in *Connell*:

> Discussion of "special problems" in the construction industry, applicable to both the § 8(e) proviso and the attempt to overrule *Denver Building Trades*, focused on the problems of picketing a single nonunion subcontractor or a multiemployer building project, *and the close relationship between contractors and subcontractors at the jobsite.* [421 U.S. at 629-630, emphasis added. See also *id.* at 630, n.9 citing portions of the legislative history.]

The 1959 legislative history makes clear Congress' awareness of and concern with the fact that given the structure of the construction industry *Denver Building's* failure to recognize the close relationship between a general contractor and his subcontractors worked to deny construction unions a right enjoyed by industrial unions— the

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[7] 341 U.S. at 692-693. See also *Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir.); *Essex County & Vicinity District Council of Carpenters v. NLRB*, 322 F.2d 636, 640 (3 Cir.).

right to protect their working conditions by picketing a job site at which there is a labor dispute.[8]

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[8] So, for example, the memorandum by Representatives Thompson and Udall explained:

> First, the amendment is necessary to extend to unions in the construction industry the rule which presently applies to employees in all other industries. *Employees of a mine or mill-owner or in a factory may peacefully picket their place of employment in seeking higher wages, shorter hours, better conditions of employment, or other lawful objectives.* So long as their placards are honest, the pickets do not have to choose their words with an eye to the legal consequences. They may ask other employees not to cross the picket line.
>
> *Construction workers are denied this basic freedom to picket the scene of a labor dispute, as explained above, because of the peculiar structure of the construction industry.* If the union which represents the electricians in the electrical maintenance department of a factory engages in picketing and the employees in other departments honor the picket line, there is no secondary boycott. It should make no difference that the departments of a construction job are different contractors for they are working toward one common goal.
>
> Second, none of the grounds for outlawing secondary boycotts apply to picketing of a construction site where the employer engaged in the primary labor dispute is actually working.
>
> (a) When the picketing is confined to the construction site where the primary employer is working, there is no danger of the dispute spreading through the community in the manner of true secondary boycotts.
>
> (b) Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeels. The illegality of such a boycott would not be affected by the amendment.
>
> (c) The third reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they

But for a parliamentary problem (2 Leg. Hist. 1397-1398, 1434-1436), the Conferees would therefore have reversed *Denver Building* by treating the contractors and the subcontractors on a construction site as a single employer for purposes of the secondary boycott provisions of the Act. This change would have *narrowed* the application of both §§ 8(b)(4) & 8(e) in the construction industry. In contrast, adoption of § 8(e) as passed by the House, whose language in essence tracked that of § 8(b)(4), would have *extended* the *Denver Building* principle from picketing to agreements, and would have prohibited all secondary agreements between unions and contractors regulating the labor conditions of subcontractors. Because the Conferees recognized the essential unity of all contractors on a construction site, and because of the procedural roadblock to full effectuation of thta recognition, the Conferees determined to exclude such agreements from § 8(e) and by doing so to at least prevent the extention of the *Denver Building* principle.

3. *Other Problems of the Construction Industry Of Which Congress Was Aware When it Sought To Preserve the Pattern of Bargaining in That Industry.*

(a) The 1959 Congress' perception of business and employment practices and collective bargaining agreements in the construction industry was considerably informed by its study of hiring arrangements in that industry which led to the enactment of § 8(f). This matter was the subject of hearings in the labor committees of both Houses; it was against this background that the Conferees considered the construction industry's special

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have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others. [2 Leg. Hist. 1577, emphasis added.]

problems when the differing versions of § 8(e) came before them.

Congress recognized that construction industry employees work for many different employers for short periods of time:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on the various states of construction. [S. Rep. No. 187, 86th Cong., 1st Sess., at 27, 1 Leg. Hist. 424; H. Rep. No. 741 on H.R. 8342 at 19, 1 Leg. Hist. 777.]

Congress also recognized that, in the construction industry

> it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, *such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.* [S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959), 1 Leg. Hist. 423 (emphasis added).]

This pattern of bargaining accommodates the specific needs of the contractors in that industry:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool . . . there is no doubt . . . that the union will in fact

represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424.]

In order to reconcile the provisions of the NLRA with the characteristics of the industry and the needs of those working in it, Congress in § 8(f) both permitted voluntary pre-hire agreements, and specifically sanctioned the union's role in referring applicants for employment, permitting "priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area." (§ 8(f)(4).) [9]

(b) The lessons of this legislative history are plain.[10]

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[9] Section 8(f) provides in pertinent part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or * * * (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[10] The analysis which follows, while derived from the problems which led to authorizing, *inter alia*, pre-hire agreements in the construction industry, is not to be taken as limited in its application to § 8(f) agreements. Construction industry collective bargaining relationships, even when entered into as a result of a § 9(a)

First, Congress recognized that a construction industry union, in entering into a collective bargaining agreement, is legitimately interested in protecting the interests both of present employees, if there are any, and of future employees of the contractors. Moreover, the union's interest, and that of the employers as well, encompass matters beyond the economic terms and conditions of a particular project, including, principally, the allocation of job opportunities on future projects.[11]

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election or other showing of majority support, are ordinarily characterized by the same degree of intermittent employment, and by agreements which extend beyond the life of the particular project or projects in existence at the time the union proved a majority. Thus, eevn such agreements are in a sense "pre-hire" with respect to projects begun during the terms of the collective bargaining agreement.

[11] In addition to the obvious purpose of assuring the union employees will have jobs in the future at all, there is an additional interest arising from the form of fringe benefits provided in the construction industry. Typically, benefits are provided through contributions to a trust fund jointly administered by the union and employer parties to a collective bargaining agreement, pursuant to § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). Section 302 forbids payments into such funds except if "specified in a written agreement with the employer" and also provides that any funds contributed must be "for the sole and exclusive benefit of the employees of such employer . . .". See, *e.g.*, *NLRB v. Amax Coal Co.*, —— U.S. ——, 49 L.W. 4880, 4882 (June 29, 1981). Thus, potential employees of an employer who has promised to provide fringe benefits in this manner have an interest in protecting the integrity of the economic aspects of the collective bargaining agreement which goes beyond a promise not to engage a subcontractor who pays less in total wages and benefits than the monetary equivalent provided in the collective bargaining agreement of the primary contractor. For, a subcontractor who is not a signatory to a written agreement is forbidden by § 302 from paying into the trust fund, and therefore, the fund from which the employees covered by the agreement will later draw their benefits will have less money available than if the subcontractor was also obliged to pay into the fund. Further, the alternative used in *Walsh v. Schlecht*, 429 U.S. 401—permitting subcontracting to a nonsignatory subcontractor but requiring the primary con-

Second, as Congress recognized from its consideration of the *Denver Building* problem, see pp. 16-18, *supra*, subcontracting is the usual rather than the extraordinary practice in the construction industry. Thus, the employees who are ultimately hired will receive the protection provided by the collective bargaining agreement only if subcontracting is limited to subcontractors who are signatories to the same agreement, or one providing identical terms. For example, only through such an agreement can a subcontractor be bound: to hire from the pool of persons the primary contractor has been hiring from;[12] to make fringe benefit contributions on behalf of his employees to a § 302 fund; and to abide by a grievance and arbitration procedure, such as that contained in the agreements here. If the contractor subcontracts work to a *nonunion* subcontractor, work which the contractor could otherwise perform himself with union employees, then the union employees whom the agreement was supposed to protect lose that protection.

The latter point, which is of special practical importance in the construction industry, is further illuminated by comparing the on-site subcontracting problems in that industry to the somewhat different problems presented by

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tractor then to make contributions measured by the hours worked by the subcontractor's employees—solves the problem only in part. The flow of contributions into the fund is maintained, but the union employees who would otherwise have worked on the project are not themselves credited with hours worked for purposes of later benefit calculation; and the employees of the *subcontractor*, even if they turn out to be the same individuals, are "ineligible for trust fund benefits based on . . . work performed for [a nonsignatory subcontractor]." *Walsh*, 429 U.S. at 407.

[12] Indeed, if the referral arrangements with the contractor and the subcontractor are the same, it is likely that the subcontractor will hire the same individuals the contractor would have hired.

subcontracting in the industrial context. In *Fibreboard Corp. v. Labor Board*, 379 U.S. 203, this Court discussed the problem of "contracting out" in the industrial context, and concluded that an employer is obliged to bargain concerning "contracting out of plant maintenance work, previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform * * *." *Id.* at 210. While noting that restrictions in collective bargaining agreements on subcontracting were widespread, the Court did not require bargaining upon all forms of contracting out. *Id.* at 215. Where the company actually "replaced existing employees with those of an independent subcontractor to do the same work under similar working conditions" (*id.* at 213; *see also id.* at 224; Stewart, J., concurring), however, the employees' interest in job security was deemed to be a "term or condition of employment" giving rise to a duty to bargain.[13]

While *Fibreboard* arose in the industrial context, its recognition that employees working under a collective bargaining agreement have a vital interest in seeing that they are not, through the subcontracting device, "replaced * * * with other workers willing to work on the same job in the same [location] without the various fringe benefits so costly to the company" (*id.* at 224 (Stewart, J., concurring)) applies to those who work on construction sites as well. But, because of the difference between industrial and construction site employment, of which the 1959 Congress was well aware, the job security concerns of employees in the construction industry have a somewhat different focus. Because they will in any event be terminated once a given project is completed, the concern of union employees is not that they will be re-

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[13] *First National Maintenance Corp. v. N.L.R.B.*, —— U.S. ——, 49 L.W. 4769, 4772-3 (June 22, 1981), reaffirmed this aspect of *Fibreboard*.

placed by non-union workers at the particular location at which those union employees are already working, but that the union-represented pool of workers as a whole will be "replaced" at future projects. Further, because subcontracting is the usual practice in the industry, for reasons unrelated to labor relations, and because the construction labor pool is not attached to a particular employer but to the industry generally, union construction employees, unlike industrial employees, have no interest in forbidding "contracting out" altogether. Their interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their employer works, whether he does the work himself or contracts it out.

National Woodwork is also illuminating in this context. The Court there concluded that a particular type of subcontracting clause—that preserving for employees in a unit "work traditionally done by them" (386 U.S. at 635)—is not prohibited by § 8(e) itself even without regard to the proviso. While such clauses come within the terms of § 8(e), their fundamental purpose is primary rather than secondary, and they are therefore not wthin the intended reach of that section. *Id.*

Read in light of both the understanding of the nature of employment in the industry, and the problems generated by *Denver Building*, which Congress did not wish to exacerbate, subcontracting clauses in collective bargaining agreements covering construction site work can be seen to serve basically the same primary purpose as the work preservation clause in *National Woodwork*. A construction industry collective bargaining agreement, like the ones here in question, usually provides that certain kinds of jobs are to be done by the unit employees. An agreement forbidding the contracting out of all such work would plainly be valid under *National Woodwork*. But such an agreement, in the context of the construction industry, would hamper the ordinary practices of em-

ployers with respect to subcontracting, while going further than necessary to preserve the legitimate interests in job security and the integrity of the collective bargaining agreement. The employees' interest is in working, and in working for an employer with whom the union can bargain for continuity in hiring practices, fringe benefit contributions, and other matters not limited to the economic terms of the agreement; whether it is the same or a different employer is immaterial. A union signatory subcontracting clause protects that interest.

(c) The Court of Appeals in *Schriver* recognized "the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case" (635 F.2d at 879). That court quoted a report, Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Labor Review 579 (part 1), 715 (part II) (1961) as follows:

> After describing the prevalence of subcontracting agreements in the construction industry, the study noted:
>
> > The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. This provision "blankets in" the subcontractor, no matter what project he works on in the local union's jurisdiction or which prime employer he works for.
>
> *Id.* at 715. Although the report surveys and describes every type of subcontracting agreement used in a major collective bargaining agreement in the construction industry at that time, *not one agreement was found to limit the applicability of the subcontracting restriction to particular jobsites at which both union and nonunion workers were employed.* *Id.* at 715-16. [635 F.2d at 859, emphasis in the opinion.]

That court also quoted the Lunden study in describing the purpose of such subcontracting agreements.

> In the construction industry, subcontracting is generally accepted by unions and employers as a normal condition of work. Few provisions were found that attempted to preserve job opportunities by creating certain conditions under which management could contract out. For example, only one clause prohibited subcontracting if it would result in layoff, and a very small number required the company to notify the union in advance of subcontracting or to subcontract only after receiving union approval. On the other hand, *the protection of contract standards was of major interest.* The most common restrictions required the subcontractor to comply with the terms of the prime employer's contract, to have a union agreement of his own, or to employ union labor and use union-made material. [635 F.2d 880, quoting 84 Monthly Labor Review at 75; emphasis in the opinion.]

From this the *Shriver* Court of Appeals concluded:

> In other words, the purpose of subcontracting provisions in the construction industry is not simply to avoid "friction" on the jobsite that may arise when both union and nonunion workers are present. A fundamental purpose of subcontracting agreements is, and always has been, to protect contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements were not allowed. [635 F.2d at 880.]

Then, after describing the special nature of employment in the construction industry, which we have discussed above, the *Shriver* opinion continues:

> Moreover, it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite, a fact recognized by Congress in enacting § 8(f) in 1959. To repeat the words of the Senate Report, labor agreements in the construction industry "necessarily apply to jobs

which have not been started and may not even be contemplated." Senate Report, *supra*, at 28 U.S. Code Cong. & Admin. News 1959, p. 2344; I Legislative History at 424. The position urged upon us by the employers would force unions and employers to negotiate subcontracting agreements on a jobsite by jobsite basis, despite the fact that § 8(f) authorizes collective bargaining agreements in the construction industry without limitation with respect to the employer's current and future jobsites in the area covered by the union's jurisdiction. We believe it to be inconceivable that the same Congress that enacted § 8(f) to accommodate the special characteristics of the construction industry ignored those very same characteristics in enacting the construction industry proviso to § 8(e). Certainly nothing in the legislative history to those sections suggests such a result. [635 F.2d at 881.]

* * *

In sum, we submit that the expressions of purpose in the Conference Report and in Senator Kennedy's statement show that the construction industry proviso protects agreements such as those here and that those legislative materials are controlling. Moreover, the history of Congress' consideration of the problems in the construction industry prior to the Conference's adoption of the construction industry proviso, and the evidence of the actual pattern of bargaining in that industry which Congress intended to preserve through that proviso further reinforce the conclusion that the subcontracting agreements at issue in this case are lawful.

C. The Legality of These Agreements is Entirely Consistent with *Connell* Because That Decision Was Limited to Agreements Outside a Collective Bargaining Relationship.

The language and the legislative history unmistakably evidence the Congressional intent not to forbid construction industry subcontracting agreements such as are involved in this case. The petitioners nonetheless argue that the proviso is inapplicable because of this Court's

decision in a prior case involving § 8(e), *Connell*. Indeed, two of them contend that *Connell* announces the extraordinary proposition that the legislative history of the proviso is to be disregarded.[14] However, a unanimous Board (239 NLRB at 248-250), the District of Columbia Circuit in *Schriver* (635 F.2d at 840-846) and the majority below (654 F.2d at 1314-1321) all determined after thorough analyses that the *Connell* decision does not extend to this case, and even the original panel of, and the dissenting judges in, the court below recognized that the result which they reached was not required by *Connell* (609 F.2d at 1347; 654 F.2d at 1325). We now show that the Board and the Courts of Appeals correctly distinguished *Connell*. Thus, nothing in the case law militates against adhering to the clear manifestations of the Congressional intent provided by the proviso's language and legislative history.

1. In *Connell* the Court stated the case as follows:

> The [union (Local 100)] supported its efforts to organize mechanical subcontractors by picketing certain general contractors, including [Connell]. The union's sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union's current collective-bargaining agreement. The union disclaimed any interest in representing the general contractor's employees.
>
> . . . [T]he picketing [of Connell] succeeded, and [the Company] seeks to annul the resulting agreement as an illegal restraint on competition under federal and state law. The union claims immunity from federal antitrust statutes and argues that federal labor regulation pre-empts state law. [*Id.* at 618-619.]

After setting out the basic facts in Part I of its opinion (*id.* at 619-621), the Court in Part II discussed "orga-

[14] Brief for Pacific Northwest Chapters, Etc., pp. 40-41; Brief of Oregon-Columbia Chapter, Etc., p. 36.

nized labor's exemption from federal antitrust laws" (*id.* at 621-626). Part III considered "the construction industry proviso to § 8(e)" of the NLRA (*id.* at 626-635), and Part IV rejected Connell's contention that state, as well as federal, antitrust law "may apply" (*id.* at 635-637). The *Connell* Court's ultimate holding was:

> We therefore hold that *this agreement, which is outside the context of a collective-bargaining relationship* and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions. [*Id.* at 635, emphasis added.]

Part III of *Connell* was occasioned by Local 100's contention that "the kind of agreement it obtained from Connell is explicitly allowed by the construction industry proviso to § 8(e) and that antitrust policy therefore must defer to the NLRA". 421 U.S. at 626. The Court restated the basis of that contention by quoting the proviso and noting:

> Local 100 is a labor organization, Connell is an employer in the construction industry, and the agreement covers only work "to be done at the site of construction, alteration, painting or repair of any building, structure, or other works." Therefore, Local 100 says, the agreement comes within the [plain language of the] proviso. [*Id.* at 627]

The Court next set forth the contractor's contrary position:

> Connell responds by arguing that despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that

> is, Congress did not intend to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors. [*Id.* at 627-628.]

And the Court completed its introduction to Part III by stating:

> On its face, the proviso suggests no such limitation. This Court has held, however, that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. [*Id.* at 628.]

The Court then examined the legislative history of the proviso and the other amendments to the NLRA enacted in 1959, and, on the basis of that examination, concluded:

> These careful limits on the economic pressure unions may use in aid of their organizational campaigns [in the 1959 NLRA Amendments] would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, *at large*, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well. [*Id.* at 633, emphasis added, footnote omitted.]

We do not see how this language can be fairly read except as a *rejection* of Local 100's "broad" suggestion that the proviso "allow[s] unions to seek subcontracting agreements *at large*" and as an *affirmation* that the proviso's authorization *does* "extend * * * to agreements

in the context of collective agreements"—and "possibly" in one instance beyond.[15]

The manner in which the *Connell* Court analyzed the 1959 legislative history and distinguished two cases cited by the union further supports this conclusion. The Court noted that Congress apparently adopted the construction industry proviso in order to in part resolve "the problems of picketing a single nonunion subcontractor on a multi-employer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court also observed that the proviso has been viewed as an effort "to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site." *Id.* at 630, *quoting Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir.).

Yet "Local 100 [did] not suggest that its subcontracting agreement [was] related to any of these policies." 421 U.S. at 631. Local 100 conceded that it sought the

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[15] We emphasize the Court's word "possibly". *Connell* does not decide whether a union without a collective bargaining relationship with a general contractor could enter into a subcontracting clause with respect to a particular jobsite, because "Local 100 [was not] trying to organize a nonunion subcontractor on the building project it picketed", *id.* at 631, and the agreement Local 100 sought was not, therefore, limited to that site. By thus leaving open the question whether such a limited agreement would be valid, the Court was indicating that there may be situations in which a subcontracting clause outside a collective bargaining relationship might be lawful. The phrasing of its statement of the scope of the Section 8(e) proviso (particularly the use of "as well") leaves no room for the contention that the particular jobsite limitation would apply where there *is* a collective bargaining relationship. *See also* the Court's holding, *id.* at 635, quoted in full at p. 29, *supra*, which invalidated only agreements outside the context of a collective bargaining relationship *and* not restricted to a particular jobsite." (emphasis added) The use of "and" rather than "or" can signify only that even some such agreements may be lawful and not that some *collective bargaining* agreements may be unlawful.

agreement "solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees." Thus, said the Court:

> If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite. [*Id.* at 631-632, footnote omitted.]

The Court deemed Congressional approval of unlimited agreements with stranger contractors to be "highly improbable" because one of Congress' major aims in 1959 was to limit top-down organizing. *Id.* at 632.

In the footnote to the passage just set out (421 U.S. at 631 n.10) the Court discussed the Board's decision in *Los Angels Building and Construction Trades Council (B & J Investment Co.)*, 214 NLRB 562 (1974) and a memorandum from the Board's previous General Counsel (Mr. Peter Nash) in *Plumbers Local 100 (Hagler Construction Co.)*, No. 16-CC-447 (1974). The Court noted that in *B & J Investment* "[t]he agreement in question may have been a pre-hire contract under § 8(f) and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship." 421 U.S. 631-632. *Hagler* was also distinguished because it was

> plainly addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective-bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work cov-

ered by the agreement. [421 U.S. at 631, emphasis in original.]

The Court did not suggest that either *B & J Investment* or *Hagler* was wrongly decided. On the contrary, these cases were distinguished from *Connell* on the precise ground that in *Connell* there was no collective bargaining relationship and no attempt to obtain one.

Thus, a careful reading of the *Connell* opinion—especially its repeated references to the absence there of a "preexisting collective-bargaining" relationship, its pointed advertence to Connell's argument that the union, Local 100, was a "stranger"; and the basis on which it distinguished earlier actions by the Labor Board and its General Counsel—all fully justify the conclusion of the court below: "The first and most obvious distinction of *Connell* from the present cases is that the agreements in *Connell* arose out of the context of a collective-bargaining relationship." 654 F.2d at 1315.

2. The distinction between this case and *Connell* not only accords fully with this Court's opinion, but is essential to fulfill the Congressional intent.

Since the essence of petitioners' case is the contention that *Connell* calls for a narrow reading of the proviso in order to prevent "top-down organizing" the thoughtful discussion and rejection of that point in the opinion below merits full quotation:

> We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job

next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means

> other than signing the demanded subcontractor agreement.[36] Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry. [654 F.2d at 1320-1321, emphasis in original.]

We call particular attention to that court's recognition that the question presented here is "which interpretation [of the proviso] best effectuates Congress' accommodation of the conflicting objectives of curbing 'top-down' organizing and of protecting collective bargaining under the peculiar conditions of the construction industry." This formulation is in accord with the teachings of this Court in *Machinists v. Labor Board*, 362 U.S. 411, where Justice Harlan wrote:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. [362 U.S. at 428.]

In this connection, Justice Harlan readily granted "that the interest in employee freedom of choice is one of those given large recognition by the Act as amended [in 1947]." *Id.* But that interest did not warrant "disregard [for] the interest in 'industrial peace'" which § 10(b), also added in 1947, is intended to further. *Id.* So here, the interest in regulating top-down organizing which interferes with in employee free choice cannot override the

interest which Congress did safeguard in the Section 8(e) proviso—that of construction industry employees who have made the free choice of selecting decision in protecting their work opportunities and labor standards and of preserving existing practices in the construction industry.[16]

II. THE CONTENTION THAT IT IS UNLAWFUL TO STRIKE FOR AN AGREEMENT WHICH IS LAWFUL UNDER THE CONSTRUCTION INDUSTRY PROVISO IS NOT PROPERLY PRESENTED, AND IS WITHOUT MERIT.

A. It is contended in some of the petitioners' briefs that it is unlawful to strike for an agreement whose legality is preserved by the construction industry proviso.

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[16] In the *Machinists* opinion, Justice Harlan also disapproved an argument, closely akin to one appearing in several of the briefs on petitioners' side, based on § 7 of the Act:

> As to the argument drawn from § 7, it would be enough to note that that very provision is in terms limited by the scope of the § 8(a)(3) proviso. * * * More to the heart of the matter, it is the entire Act, and not merely one portion of it, which embodies "the definitive statement of national policy." It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate [or the courts] to approach either side of that line grudgingly. [362 U.S. at 417-418, n.7.]

In the same footnote, Mr. Justice Harlan disposed summarily of the

> principle that, exoneration of certain types of union security clauses having been granted in a proviso, the burden of proving the proviso's applicability rests on him asserting it. The latter principle need not detain us; insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments. [*Id.* at 417 n.7.]

That issue is not properly presented, for two reasons. First, the General Counsel, exercising his exclusive authority to determine the scope of unfair labor practice complaints (see §§ 3(d) and 10(b) of the Act) did not proceed on that theory and for that reason alone, the Board correctly refused to grant relief on that theory. Indeed, the Board would have usurped the General Counsel's authority by considering that issue. Second, petitioners did not themselves raise the issue before the Board, and are therefore barred from raising it in the courts by virtue of § 10(e) of the Act. The fact that the court below did pass on the contention, and rejected it on the basis of the uniform precedent in the Ninth Circuit and in other Courts of Appeals (654 F.2d at 1323) does not remove the § 10(e) bar, for that provision is a limitation on the authority of the courts. *Labor Board v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 and cases cited *id.* See also, *e.g.*, *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281, n.3.

B. Nonetheless, in what may be an excess of caution, we show petitioners' contention—that only voluntary § 8(e) proviso agreements are lawful—to be without merit. Since, as already noted, the contention is not properly here, and has been uniformly disapproved by the Courts of Appeals,[17] our discussion can be brief:

1) Petitioners' interpretation is contrary to the plain language of the provision upon which they rely, § 8(b)(4)(A). As amended in 1959, that provision now declares it to be an unfair labor practice to engage in

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[17] *Essex County and Vicinity Dist. Council of v. NLRB*, 332 F.2d 636 (3d Cir.); *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir.); *Constr. Prod. & Maintenance Laborers Union, Local 383 v. NLRB* (*Colson & Stevens Construction Co.*, 323 F.2d 422 (9th Cir.). See also *Northern Indiana Bldg. and Const. Trades Council* (*Centlivre Village Apartments*), 148 N.L.R.B. 854 (1964) overruling *Constr. Prod. & Maintenance Laborers Local 383* (*Colson & Stevens Constr. Co.*), 137 N.L.R.B. 1650 (1962).

certain conduct (including strikes) where an object is "forcing or requiring any employee or self-employed person * * * to enter into any agreement which is prohibited by subsection (e) of this section [8]." An agreement which is within the proviso to subsection (e) is *not* "prohibited" by that subsection; the very purpose of that proviso is to protect such agreements.[18]

2) Here again, the legislative history confirms the interpretation that flows from the natural reading of the language. Petitioner Woelke presents a misleading partial quotation from Senator Kennedy. According to Woelke, Senator Kennedy stated that ". . . the [construction industry] proviso does not relate to Section 8(b)(4) . . . II Leg. Hist. 1433 (1959)." Woelke & Romero Br. p. 45. What he actually said in that sentence was, "Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable." 2 Leg.Hist. 1433. That sentence, therefore, does not address the present problem. Senator Kennedy did, however, address that in the *next* sentence of his speech (not quoted by Woelke). He said, "It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." *Id.* In light of that statement, it is again necessary to consider what Congress viewed the law to have been with respect to the strikes to obtain contracts such as those involved in the present case. *Brown v. GSA*, 425 U.S. 820, 828; *Moor v. County of Alameda*, 411 U.S. 693, 711.

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[18] If petitioners' interpretation were accepted and the construction industry proviso were to be disregarded in determining the legality of a strike to obtain an agreement which would be within § 8(e) but for the proviso, it would also be unlawful for unions in the garment and clothing industries to strike to obtain a clause protected by *that* proviso. This would result in the incongruity that unions could strike to enforce such agreements (as the garment industry proviso clearly provides to that extent for the overruling *Sand Door*) but could not strike to obtain them.

Again, Congress' understanding of the then existing state of the law clearly appears in the legislative history. Senator Kennedy's own views are reflected in a statement prepared by him and Representative Thompson and presented by the latter to the House after the Conference had acted. After describing "hot cargo" clauses, and the holding of *Sand Door* that a union may not strike to enforce such a clause, that statement continues:

> Unfortunately there are a good many cases in which the Teamsters, without any inducement of employees, is often able to persuade the secondary employer not to carry the goods and not to require his employees to handle them. It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages, or to refuse to live up to the contract once it has signed it, when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, thus freeing the union to present new demands in collective bargaining. [2 Leg. Hist. 1708.]

Prior to the Conference Report other members of Congress who proposed to outlaw strikes to obtain "hot cargo" clauses (as well as the clauses themselves) expressed their understanding that such strikes were then lawful. See 2 Leg. Hist. 944 (Senator Dirksen, presenting the Administration's bill); 2 Leg. Hist. 1079 (Senator Goldwater); 2 Leg. Hist. 1197 (Senator Curtis); 2 Leg. Hist. 1462 (Representative Cramer); 2 Leg. Hist. 1523 (Representative Griffin); and 2 Leg. Hist. 1581 (Representative Rhodes).

Accordingly, we think it is too clear to be questioned that Congress understood the law which it was preserving with respect to the construction industry was that strikes

to obtain agreements, which would have been prohibited but for the proviso, were lawful as the law then stood.[19]

Thus, there is no merit in petitioners' contention that it is unlawful for a union to strike to obtain an agreement which is protected by the construction industry proviso to § 8(e).

---

[19] At p. 46 of its brief, Woelke cites three cases which purportedly of stand for the proposition that picketing to obtain a subcontracting clause was illegal under § 8(b)(4) at the time of the 1959 amendments. Woelke's reliance on these cases is entirely unjustified. In the first of these the Board found that *an* object of the strike was to require the picketed general contractor to cease doing business with a particular nonunion subcontractor on a presently existing project, and therefore was an example of a classic secondary boycott in violation of what was then § 8(b)(4)(A). *Local 47 International Bro. of Teamsters, Etc.*, 112 NLRB 923, 924-925 (emphasis in original) enforced on this theory, 234 F.2d 296, 300-301 (5 Cir.). Indeed, the Board in the *Local 47* case took pains to observe: "Whether the unions' picketing also violated 8(b)(4)(A) insofar as it sought to regulate further dealings by [the general contractor] with such subcontractors (not as yet identified) as might refuse to meet the unions' wage standards, is a question which we need not and do not decide." (112 NLRB at 925, n.2). In the second case cited by Woelke, *Bangor Building Trades Council, AFL-CIO*, 123 NLRB 484, enforced on this theory, 278 F.2d 287 (1 Cir.), the unions were not even attempting to have the general contractor enter into a subcontracting clause, but rather were picketing to enforce an existing clause by requiring the general contractor to terminate the subcontractor or require the latter to conform to union standards. This was, of course, conduct identical to that found illegal in *Sand Door*, as the Board said (123 NLRB at 489 and n.3). The final case cited by Woelke, *Bricklayers, Masons, Etc.*, 125 NLRB 1179, is also completely irrelevant, since it was decided on December 29, 1959, more than three months after the enactment of the 1959 NLRA amendments by President Eisenhower's signature on September 14, 1959.

In short there was simply nothing in the 1947 statute which forbade strikes for an object of compelling an employer to enter into a "hot cargo" clause. Section 8(b)(4)(A) (as it then was; it is now 8(b)(4)(B)) prohibited secondary boycotts, which included, as *Sand Door* held, a strike to enforce a "hot cargo" clause. But since such agreements were lawful and under *Sand Door*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals affirming the order of the Board should be affirmed.

Respectfully submitted,

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judicially enforceable (see 357 U.S. at 108), it would have been contrary to the whole spirit of the Act to hold that a union could not strike to obtain such an agreement. See, in addition to § 13, *Labor Board v. American National Insurance Co.*, 343 U.S. 395.

STATUTORY APPENDIX

This case involves §§ 8(b)(4) and 8(e) of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.*, Title 7 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Section 8(b)(4) provides in pertinent part as follows:

> Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents: * * *
>
> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to

make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

Section 8(e) provides as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether union signatory subcontracting clauses—*i.e.*, contract clauses barring subcontracting except to contractors who are signatories to agreements with particular unions—that are sought or negotiated in the context of a collective-bargaining relationship are privileged by the construction industry proviso to Section 8(e) of the National Labor Relations Act, where they are not limited in application to particular jobsites at which both union and nonunion workers are employed.

2. Whether a union violates Section 8(b)(4)(A) of the Act by picketing to obtain a union signatory subcontracting clause that is lawful under the construction industry proviso to Section 8(e).

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the en banc court of appeals (W. & R. Pet. App. 1–52) is reported at 654 F.2d 1301.[1] That opinion reviewed

[1] The case was heard and decided by an 11-member en banc panel in accordance with the Act of Oct. 20, 1978, Pub. L. No. 95–486, Section 6, 92 Stat. 1633, and Rule 25 of the Rules of the Ninth Circuit.

two related National Labor Relations Board cases consolidated for hearing and decision in the court of appeals. The decision and order of the Board in *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)* (W. & R Pet. App. 71–103), a case in which petitioner in No. 80–1798 was a party, are reported at 239 N.L.R.B. 241. The decision and order of the Board in *International Union of Operating Engineers, Local No. 701 (Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.)* (P.N.W. Pet. App. A–147 to A–182), a case in which petitioners in Nos. 80–1808 and 81–91 were parties, are reported at 239 N.L.R.B. 274.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1981 (W. & R. Pet. App. 1). The petitions for a writ of certiorari in Nos. 80–1798 and 80–1808 were filed on April 29, 1981, and that in No. 81–91 was filed on July 14, 1981. The three petitions were granted and the cases consolidated on October 5, 1981 (J.A. I 97–98). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the Appendix, *infra*, 1a–3a.

STATEMENT

A. *Woelke & Romero*

From July 5, 1974, to June 15, 1977, petitioner Woelke & Romero Framing, Inc. ("Woelke"), a framing subcontractor in the construction industry in southern California, was party to a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO ("Carpenters") (W. & R. Pet. App. 76; J.A. I 17).

Since at least 1941, collective bargaining agreements like the one to which Woelke was a party—a master labor agreement ("MLA") establishing the terms and conditions of employment for union-represented carpenters working in 11 southern California counties—have been in effect in California (J.A. I 17, 20, 26–66). In practice, contractors signatory to the Car-

penters' MLA either themselves hire carpenters, in accordance with the union referral provisions in the agreement, or subcontract the work to employers who are also signatory to the MLA and will hire and employ carpenters in accordance with those provisions (J.A. I 20.[2] Carpenters has represented between 57,000 and 69,000 carpenters under these agreements since 1946 (J.A. I 21). Since 1959, some 850 contractors—bargaining through two different employer associations—have been signatory to the MLA; in addition, over the years some 4000 independent contractors, not members of one of the multiemployer associations, have become parties to the MLA by virtue of their individually executing so-called "short-form" agreements (J.A. I 21–22). The majority of the carpenters working under the MLA work for more than one signatory employer in any given year and work for numerous signatory employers in the course of their careers (J.A. I 19–20).

In June 1977, shortly before their current agreement was to expire, Woelke and Carpenters commenced bargaining for the purpose of negotiating a successor agreement. In August 1977, however, the parties reached an impasse over, *inter alia*, Carpenters' demand for a union signatory subcontracting clause, *i.e.*, a clause that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement" (W. & R. Pet. App. 77–78, 79; J.A. I 18, 85–90).[3]

---

[2] The relevant portions of the exclusive referral provisions in the 1974–1977 MLA are set forth at J.A. I 37–38.

[3] The union contract proposals reprinted in the Board's decision (W. & R. Pet. App. 78–81) and in petitioner's brief (W. & R. Br. 6–7) do not appear in that precise form in the stipulated record (J.A. I 85–90), but the differences are inconsequential. Thus, the parties stipulated that the subcontracting proposal at issue is "set forth below in Exhibit E attached hereto" (J.A. I 18). The relevant portions of Exhibit E—reprinted at J.A. I 84–90—reveal, however, that Carpenters' actual proposal was not in final form but contained shorthand references such as (J.A. I 88):

103.2 As is in MLA (except renumbered to 103.5.).

103.3 As is in MLA (except renumbered to 103.6.).

For convenience, the Board and petitioner have reprinted the old provisions, with their new number. This is also how the provisions were set forth in the complaint (J.A. I 6–7).

The stated purposes of Carpenters' subcontracting proposal were "to preserve and protect the work opportunities normally available to employees * * * covered by this Agreement"; to maintain and protect "standards and benefits of employees * * * negotiated over many years"; and to preserve "the right of union employees, employed hereunder, from being compelled to work with non-union workmen" (W. & R. Pet. App. 78; J.A. I 85). In pertinent part, the proposed clause stated (W. & R. Pet. App. 79; J.A. I 86):

> 103.2. The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use), except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreemen[t.[4]]

In addition to the subcontracting clauses, the MLA which Carpenters sought to renew, as amended,[5] contained provisions recognizing Carpenters as the exclusive bargaining representative of employees working under the agreement (J.A. I 35) and detailing the rules governing such subjects as working hours (J.A. I 42–46), reporting pay (J.A. I 46), travel, subsistence, and parking (J.A. I 47–48, 53), meal periods (J.A. I 49), wage rates and payments procedures (J.A. I 49–50, 55–58), piecework rates and procedures in residential construction (J.A. I 63–66), maintenance and security for tools, efficiency on the job, and safety (J.A. I 41, 52–55), and contributions to jointly administered multiemployer trust funds providing health care benefits, pensions, and vacation pay to employees

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[4] The expiring contract contained a union signatory subcontracting clause (Section 103) that was differently worded but, so far as relevant here, was similar in effect (J.A. I 28).

[5] Exhibit C, a 22-page document detailing the various amendments to the MLA that the Carpenters initially proposed (see J.A. I 18), has not been reprinted in the appendix; the references to the subjects covered by the MLA are to the 1974–1977 MLA.

working under the agreement (J.A. I 59–63). The MLA also contains, as noted (page 3, note 2, *supra*), provisions requiring signatory employers to obtain their employees from the union-maintained hiring hall in accordance with its nondiscriminatory procedures.[6]

In support of these proposals and other demands, two Carpenters locals picketed Woelke's construction sites, causing work stoppages by other employees at certain of the sites (W. & R. Pet. App 81; J.A. I 19). Woelke filed unfair labor practice charges with the Board, asserting, *inter alia*, that the proposed restriction on its subcontracting prerogatives violated the proscription in Section 8(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. 158(e), against secondary agreements, and that, therefore, Carpenters' picketing in support of that restriction violated Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A) (W. & R. Pet. App. 71, 81–82).

B. *Pacific Northwest*

The Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. ("Oregon AGC"), an association of approximately two hundred construction industry employers in Oregon and southwest Washington, has been a party to a collective bargaining agreement with Local 701 of the International Union of Operating Engineers, AFL–CIO ("Engineers") for many years (J.A. II 9, 11–12). Since 1960, the parties' collective bargaining agreement has contained a union signatory subcontracting clause, prohibiting Oregon AGC from subcontracting construction jobsite work "to any person, firm or company who does not have an existing labor agreement with the [Engineers] Union covering such work"

[6] Woelke's counterproposals (J.A. I 67–83) contained no limitation on subcontracting and sought to remove the existing requirement that the employer look to the union-operated hiring hall as its source of labor by making use of the union hall optional (J.A. I 70–71). Further, Woelke's proposal made no provision for a pension plan and proposed an individual employer health care plan (J.A. I 73–74) in lieu of the multi-employer plan in the MLA, thereby tying eligibility to continued employment with Woelke and eliminating the "portable benefit" feature of the existing plan.

(J.A. II 910, 12) The clause in the 1975–1980 contract provides (J.A. II 9–10):

> Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting, or repair of a building, structure, not have an existing labor agreement with the Union or other work to any person, firm or company who does covering such work.

In addition, the agreement authorized Engineers to take "such action as they deem necessary"—including strikes and other economic self-help—to enforce awards or resolutions obtained through the grievance and arbitration process on matters covered by the agreement (J.A. II 10). One of the Engineers' objectives respecting the subcontracting clause was to preserve work opportunities for its members with Oregon AGC contractors (J.A. II 11–12). The collective bargaining agreement as a whole is designed to stabilize working conditions in the area by establishing uniform rates of pay and working conditions among all employers (J.A. II 16).

Like the agreement in *Woelke*, the Oregon AGC-Engineers agreement grants the union recognition as the exclusive representative of the employees working under the agreement (J.A. II 15), and it contains the same range of provisions regulating the details of the employees' working life (J.A. II 13–14, 25–28). Similarly, it requires contributions to jointly-administered fringe benefit trust funds providing health, pension, and vacation benefits to employees working for signatory employers (J.A. II 29–31). The agreement also contains provisions requiring signatory employers to obtain their employees from the union-operated hiring hall in accordance with a nondiscriminatory system of referral priorities (J.A. II 17–24).

In April 1977, petitioner Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. ("Pacific Northwest"), filed with the Board unfair labor practice charges asserting, *inter alia*, that the Oregon AGC/Engineers contract violated the proscription against secondary agreements con-

tained in Section 8(e) of the Act (P.N.W. Pet. App. A–6, A–147 to A–148, A–159).[7]

C. The Decisions of the Board

The Board agreed (W. & R. Pet. App. 84–90; P.N.W. Pet. App. A–161 to A–164) with petitioners' contention that the union signatory subcontracting clauses at issue were secondary in thrust and therefore violative of Section 8(e) of the Act, unless saved by the construction industry proviso to that Section. The Board, however, rejected the contention that the clauses were not saved by the proviso, explaining (W. & R. Pet. App. 90):

> Since the enactment of the 1959 amendments to the Act, the Board and the courts have consistently upheld contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatory to contracts either with a particular union or with unions having jurisdiction over the type of work involved.

Nor, in the Board's view, did this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), require the conclusion that the clauses here are excluded from the proviso's protection because they are not limited in application to particular jobsites at which both union and nonunion workers are employed. Rather, the Board held (W. & R. Pet. App. 97) that the construction industry proviso, as construed in *Connell*, permits subcontracting clauses like those here, where they are sought or negotiated "in the context of a collective-bargaining relationship." Finding that the subcontracting clauses here were in fact sought or negotiated in the context of "collective-bargaining relation-

[7] Petitioner Oregon AGC was technically a respondent in the Board proceeding (P.N.W. Pet. App. A–148), but it supported the position of the General Counsel and Pacific Northwest, the charging party, that the subcontracting provision violated Section 8(e) of the Act (*id.* at A–159).

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ship[s]," the Board concluded (W. & R. Pet. App. 98; J.A. II 39) that they were protected by the proviso and therefore lawful under Section 8(e) of the Act.

Accordingly, the Board dismissed (W. & R. Pet. App. 98) Woelke's claim that Carpenters' picketing in support of its subcontracting proposal (*i.e.*, picketing to *secure* a subcontracting clause) violated Section 8(b)(4)(A) of the Act. However, the Board (Chairman Fanning dissenting) determined (P.N.W. Pet. App. A–165 to A–175) that the subcontracting clause at issue in *Pacific Northwest* lost the protection of the construction industry proviso—and hence violated Section 8(e)—because of the provision in the Oregon AGC/Engineers contract permitting the union to resort to economic action if signatory employers failed to comply with grievance-arbitration decisions on any contractual matter, including the subcontracting restriction, *i.e.*, because the contract permitted strikes or picketing to *enforce* the subcontracting clause.[8] The Board ordered (*id.* at A–177 to A–180) Oregon AGC and Engineers to cease and desist from maintaining the unlawful provision and to post appropriate notices.[9]

D. The Decision of the Court of Appeals

An 11-member en banc panel of the court of appeals (see page 1 note 1, *supra*), by a 7–4 vote, upheld the Board's conclusion that union signatory subcontracting clauses like those at issue here are privileged by the construction industry proviso to Section 8(e) where they are "arrived at in the context of collective bargaining relationships" (W. & R. Pet. App. 38). Rejecting petitioners' contention that such clauses are violative of Section 8(e) unless restricted in application to particular jobsites

[8] A subcontracting agreement loses the protection of the construction industry proviso if it contains terms that sanction strikes or other self-help measures in the event subcontracting in violation of the agreement occurs, because carrying out such measures would violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *Bricklayers & Stone Masons Union, Local No. 2* v. *NLRB*, 562 F.2d 775, 787–788 (D.C. Cir. 1977).

[9] The court below enforced (P.N.W. Pet. App. A–66 to A–70) the Board's order in this respect, and no question with respect to that issue is raised here.

and particular times at which the contracting employers have union members present, the court found (W. & R. Pet. App. 26–37) that the legitimate purpose of subcontracting clauses was not only to avoid jobsite "friction" between union and nonunion workers, but also to protect contract standards that might otherwise be jeopardized because of the unique transitory nature of the employment relationship in the construction industry.[10]

SUMMARY OF ARGUMENT

I

A. In 1959, when it enacted the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. 158(e), Congress was aware that union signatory subcontracting clauses—*i.e.*, contract clauses barring the subcontracting of construction site work except to firms who are signatory to the applicable union collective bargaining agreement—were part of the pattern of

[10] The dissenting judges (W. & R. Pet. App. 44–52) adhered to the view of the original three-judge panel (W. & R. Pet. App. 53–70) that the purpose of the proviso was only to avoid jobsite "friction" between union and nonunion workers.

bargaining in the construction industry. Congress was urged by firms boycotted by such clauses to outlaw them. Although the House passed a bill that would have had this effect, the Senate refused to agree. And, in the conference, the House acquiesced in the enactment of a proviso designed to preserve the status quo with respect to agreements relating to the contracting of work to be performed on a construction site.

B. Although the construction industry proviso to Section 8(e) was apparently enacted in part to forestall the jobsite friction which resulted from having union and nonunion employees working together on the same jobsite (see *NLRB* v. *Denver Building & Construction Trade Council*, 341 U.S. 675 (1951)), this was not its only purpose. Congress enacted the proviso principally in order to avoid disrupting the existing pattern of collective bargaining in the construction industry.

Thus, because in the construction industry employees are not typically attached to a single employer, but work for various contractors or subcontractors in turn, construction unions acting on behalf of the pool of employees desirous of union representation traditionally have negotiated pre-hire agreements setting forth the terms and conditions upon which union labor would be supplied to employers in a particular geographic area. In Section 8(f) of the Act, Congress authorized construction unions to continue to negotiate pre-hire agreements that would otherwise run afoul of the Act's proscriptions against recognition and bargaining with unions that have not yet established their majority status. And, by simultaneously enacting the construction industry proviso to Section 8(e)—thereby permitting contract clauses requiring that all construction site work be performed by contractors who are bound to honor the terms of the applicable area-wide agreement with the appropriate union—Congress preserved the means that employers and unions in that industry have adopted for insuring not only that labor relations on particular jobsites are harmonious, but also that the pool of workers represented by the union will en-

joy the opportunities for regular employment and the continuity in wages, fringe benefits, and other terms and conditions of employment enjoyed by employees in more stable industries.

C. Construing the proviso as privileging subcontracting clauses, like those here, that are sought or negotiated in the context of a collective bargaining relationship, but that are not limited in application to particular jobsites where union and nonunion employees working together, does not leave construction unions free to engage in unlimited top-down organizing. A subcontractor cannot be subjected to extended picketing to force it to enter into a union agreement regardless of the wishes of its employees. Unless the picketing union files an election petition within a reasonable period of time, not to exceed 30 days, such picketing would violate Section 8(b)(7)(C) of the Act. Moreover, should the subcontractor enter into a pre-hire agreement with the union, the express terms of Section 8(f) of the Act permit the employees to challenge the union's representative status by filing an election petition with the Board. And, the subcontractor itself, if it does not have a stable workforce among whom the union has secured a majority, is free under the Act to repudiate the agreement at any project on which the union has not demonstrated that it represents a majority of its employees. See *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978).

D. Granting proviso protection to union signatory clauses sought or obtained in the context of a collective bargaining relationship is consistent with this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). In *Connell*, the Court was confronted with a novel organizational tactic: "stranger" picketing aimed at pressuring selected employers to enter into an agreement with a single term—a union signatory subcontracting clause falling within the literal terms of the construction industry proviso—and deliberately designed to circumvent the new restrictions

on organizational picketing that Congress enacted in 1959. While the Court construed the construction industry proviso as not privileging a union signatory subcontracting clause in that situation, it specifically recognized that the proviso would privilege such a clause where, as here, it was sought or obtained "in the context of collective-bargaining relationships" (421 U.S. at 633).

II

The express terms of Section 8(b)(4)(A), 29 U.S.C. 158 (b)(4)(A), of the Act prohibit coercing any person "to enter into any agreement which is prohibited by section 8(e)." Accordingly, as every court of appeals which has considered the question has held, it is not a violation of Section 8(b)(4)(A) for construction unions to picket for union signatory subcontracting clauses in their collective bargaining agreements which are privileged by the construction industry proviso to Section 8(e). Congress believed, correctly, that this was the state of the law at the time of the 1959 amendments and it declined to pass measures that would have changed the law in this respect.

ARGUMENT

I. THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT PRIVILEGES UNION SIGNATORY SUBCONTRACTING CLAUSES THAT ARE SOUGHT OR NEGOTIATED IN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP AND ARE NOT LIMITED IN APPLICATION TO PARTICULAR JOBSITES AT WHICH BOTH UNION AND NONUNION WORKERS ARE EMPLOYED

Section 8(e) of the National Labor Relations Act, was added to the Act in 1959 by the Landrum-Griffin Amendments. Pub. L. No. 86-257, 73 Stat. 543-544, now codified at 29 U.S.C. 158(e). The Section was added to strengthen the secondary

boycott prohibitions in the Act[11] and it has been construed to ban union signatory subcontracting clauses—that is, contract clauses barring subcontracting except to contractors who are signatories to agreements wth particular unions.[12]

The construction industry proviso to Section 8(e) states, however, that "nothing in * * * [subsection (e)] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of * * * construction * * *."The issue here is whether the union signatory subcontracting clauses sought or obtained by the unions through collective bargaining are within the construction industry proviso and thus saved from the ban of Section 8(e).

Read literally, the proviso's exemption for secondary subcontracting agreements plainly encompasses these agreements, since they relate to the contracting of construction site work, and, by the express terms of the statute, "nothing" in Section 8(e) applies to such agreements. Further, during the more than 20 years since the enactment of Section 8(e), the Board, with court approval, has recognized that union signatory subcontracting clauses of the sort sought or obtained by the unions here come within its broad language (W. & R. Pet. App. 90–92). In *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), this Court cautioned, however, that the construction industry proviso may not be applied literally where to do so would frustrate Congress' purpose (*id.* at 628–633); and the Court held that, in order to qualify for immunity under the proviso, agreements relating to the contracting of jobsite work must (with one possible exception

[11] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 635–639, 644–645 (1967).

[12] *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F.2d 23, 28 (9th Cir. 1964); *NLRB* v. *Milk Drivers' Union, Local 753*, 392 F.2d 845, 847 (7th Cir. 1968); *NLRB* v. *National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

the Court did not find it necessary to decide) arise in the context of collective bargaining relationships (*id.* at 633).[13]

The subcontracting clauses at issue here were sought or negotiated in the context of valid collective bargaining relationships, and to this extent satisfy *Connell*. Petitioners challenge the clauses, however, on the basis of their view that the immunity afforded by the literal terms of the proviso must be further limited in light of the suggestion in *Connell* that the function of the proviso was " ' to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site' " (421 U.S. at 630, quoting *Drivers Local 695* v. *NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966)). If this were the only purpose of the proviso, union signatory subcontracting clauses not focused solely on preventing the simultaneous employment of union and nonunion workers on the same construction site would be outside the exemption. The Board, the court below, and the only other court of appeals to decide the issue [14] have rejected such a narrow interpretation of the proviso, concluding instead that it protects all union signatory clauses regulating the contracting of jobsite construction work where those clauses are sought or obtained in the context of a valid collective bargaining relationship. We shall show that an examination of the construction industry proviso, "in light of the statutory setting and the circumstances surrounding its enactment" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local 100, supra*, 421 U.S. at 628), supports that conclusion.

A. Congress Was Aware that Secondary Subcontracting Agreements Were Part of the Pattern of Collective Bargaining in the Construction Industry Prior to 1959 and Was Urged to Outlaw Such Agreements

The Congress that enacted the construction industry proviso in 1959 was aware that agreements limiting subcontracts of

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[13] The Court added that, "in light of congressional references to the *Denver Building Trades* problem," the proviso applied "possibly to common-situs relationships on particular jobsites as well" (*ibid.*). See *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951) (discussed *infra*, pages 25–27).

[14] *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, No. 80–1257 (May 4, 1981), petition for reconsideration pending.

construction site work to firms that bound themselves to honor all the terms of the applicable collective bargaining agreement with a particular union were part of the pattern of bargaining in the construction industry prior to 1959.[18]

It was urged to pass legislation that would outlaw such agreements, and it was presented with many of the same policy arguments that petitioners now urge in opposition to like agreements.

Thus, Senator Curtis proposed legislation to close the loopholes in the existing protections against secondary boycotts; and, testifying before the Senate Labor Committee, he urged it to outlaw the making of "the so-called hot cargo secondary boycott clauses now used so extensively by the Teamsters and the Building Trades unions." *Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Con., 1st Sess. 752

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[18] The type of master labor agreement that Carpenters was picketing Woelke & Romero to sign—namely, a comprehensive agreement establishing the basic employment conditions for construction workers in a broad geographic area and including a provision that work could be subcontracted only to employers who were willing to observe all the terms of the agreement (J.A. I 26–66, 84–90)—has been part of the pattern of bargaining in Southern California, where the *Woelke & Romero* case arose, since 1941. See Pierson, *Building Trades Bargaining Plan in Southern California*, 70 Monthly Lab. Rev. 14, 17 (1950). The effect of the agreement is that the thousands of workers employed under it enjoy uniform working conditions as they move from job to job and employer to employer—the pattern typical of the construction industry. *Id.* at 14, 15. The Pierson study noted that similar bargaining arrangements also existed in certain other localities, including the Portland, Oregon, area, where the *Pacific Northwest Chapter* case arose. *Id.* at 15. The collective bargaining agreement between the Engineers and the Oregon AGC is also of this sort (J.A. II 13–31).

See also Lunden, *Subcontracting Clauses in Major Contracts—Part I*, 84 Monthly Lab. Rev. 579 (1961). Of the more than 700,000 construction workers working under the 155 construction contracts examined in the Lunden study, some 444,000 worked under contracts with subcontracting provisions (*id.* at 582), and, although the terms of these provisions varied, the most common required contractors to agree to subcontract work only to subcontractors who would apply all the "terms and conditions" of the master agreement. Lunden, *Subcontracting Clauses in Major Contracts—Part II*, 84 Monthly Lab. Rev. 715–716 (1961).

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(1959), hereinafter *"Senate Hearings."* He stated that, among the building trades unions, "these types of boycott clauses are known as standard form of agreement clauses" (*ibid.*). Adverting to the pressure such agreements placed on nonunion employees—the "top-down" organizing effect objected to by the employer representatives here—Senator Curtis warned that, through such clauses, "the unions sought to force all unionized contractors not to do business *with contractors whose employees did not want to join the building trades union"* (*ibid.;* emphasis supplied).

The House Labor Committee heard similar testimony. Representatives of an independent union and of an employer complained that, under existing law, employers and unions could lawfully enter into union signatory subcontracting clauses, and, because of these agreements, employers whose employees had selected another union were denied any opportunity to compete for construction jobs. *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474 Before a Joint Subcomm. of the House Comm. on Education and Labor,* 86th Cong., 1st Sess. 2363 (1959) (hereinafter *"House Hearings"*) (statement of Howard S. Lane); *House Hearings* 2365 (statement of Edward M. Carlton). As a representative of a California construction engineering subcontractor testified before the House Labor Committee (*id.* at 2366 (statement of Edward M. Carlton)):

> The contract [between the AGC and the Operating Engineers] contains a clause which is referred to in the industy as the subcontractor clause. In effect, that clause says that any time an AGC contractor subcontracts work [falling within that trade] the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of [the] Operating Engineers * * *.

Criticizing the alleged anti-competitive and the top-down organizing effects of these subcontracting clauses, the witness continued (*ibid.*):

> The practical effect of all of this has been to freeze out of approximately 90 percent of all available building and construction work in a huge geographical area, the

> employees of the specialty subcontractors * * * who have a contract with an independent union and who cannot lawfully make their employees join an Operating Engineers Union, or force upon their employees the terms and conditions of employment established by the Operating Engineers Union.

The 1959 Congress was not only aware of the extensive use of these subcontracting clauses, but was also informed that the Board and the courts had found them lawful. Thus, the employer representative who described the Operating Engineers' clause and its alleged evils, also testified that both the Board and the reviewing court had upheld the clause. When members of the House Labor Committee inquired about these decisions, the labor consultant to the Committee's minority members reported that the subcontracting clause had been found lawful by the Court of Appeals for the District of Columbia Circuit. *House Hearings* 2368.[16]

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[16] See *Northern California Chapter, The Associated General Contractors of America, Inc.*, 119 N.L.R.B. 1026 (1957), enforced *sub. nom. Operating Engineers Local 3* v. *NLRB*, 266 F.2d (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). The text of the court of appeals decision had been introduced into the record of the House hearings by an earlier witness. *House Hearings* 801, 803–807 (statement of Paul H. Robbins). The court, *inter alia*, upheld the Board's finding that a prime contractor (AGC) did not violate the Act by deciding, in compliance with the subcontracting clause of its agreement with the Operating Engineers, not to subcontract engineering work to a firm (Musser) that could not itself observe the terms of the AGC-Engineers agreement. (Musser could not observe the union-security provisions because its employees belonged to a different union.) See 266 F.2d at 907–908, 909–910.

In contrast to the present AGC position, the arguments of two AGC chapters before the Board in the Musser case—not long before Congress took up the 1959 amendments—included a strong defense of broad subcontracting clauses executed in a collective bargaining context. The chapters explained (119 N.L.R.B. at 1054): "[S]uch clauses have fostered and maintained stability in the construction industry in the 46-county area, and * * * a holding that the current subcontractors' clause is invalid 'would cause instability in labor-management relations' in the industry 'and would burden and obstruct commerce'." As an amicus in the present case makes clear (Georgia Power Co. Br. 8–10), the earlier AGC position remains an accurate commentary on the practical value of these clauses.

B. Congress Ultimately Determined Not to Change the Law With Respect to Secondary Subcontracting Agreements Relating to the Contracting of Jobsite Work

Although, as shown, Congress was aware of the use of secondary subcontracting clauses in the construction industry and of the principal arguments for prohibiting such clauses, it was more concerned about so-called "hot-cargo" agreements—that is, contract clauses binding the employer to boycott products manufactured by another employer with whom the union had a dispute. As explained in *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 634–637, Congress was aware that under then-existing law (*Local 1976, United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93, 98–99 (1958)), it was not unlawful for employers and unions to enter into agreements permitting employees to refuse to handle or otherwise deal with products made by other employers with whom the union had a dispute; and it regarded this implication of *Sand Door* as an undesirable loophole in the existing protections against secondary boycotts. Furthermore, a series of Senate hearings in 1958 revealed that the Teamsters Union, in particular, had used its economic leverage in the trucking industry to obtain such "hot cargo" clauses from common carrier employers and that these clauses had "conscripted neutral employers in Teamsters organizational campaigns" (*National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 634).

As originally conceived, the amendments that became Section 8(e) were limited to ending the abuses associated with hot cargo agreements in the trucking industry. In response to criticism of the bill that had been reported out by the Senate committee without addressing the problem of hot cargo agreements, Senator Gore introduced an amendment on the floor that had the effect of outlawing such agreements only in the trucking industry. 105 Cong. Rec. 6556 (1959), II Leg. Hist. 1161–1162.[17] The House Labor Committee initially reported out a bill containing a substantially identical provision. H.R. 8342, 86th Cong., 1st Sess. § 705(a)(2) (1959) (Elliott bill), I Leg. Hist. 755.

[17] "Leg. Hist." refers to the two-volume Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

Sharp differences arose as to the proper scope of the proposed reform. Nine members of the House Labor Committee dissented from the report accompanying the Elliott bill and complained, among other things, that the bill, by limiting the ban on hot cargo agreements to the trucking industry, "would seem to put a stamp of approval upon all other 'hot cargo' agreements." H.R. Rep. No. 741, 86th Cong., 1st Sess. 97 (1959), I Leg. Hist. 855 (dissenting views). Representatives Landrum and Griffin likewise dissented (*id.* at 99–100, I Leg. Hist. 857–858), and Representative Landrum—who had presided over the hearings concerning secondary subcontracting agreements in the construction industry and, together with other members of the committee, had called for a change in the existing law (*House Hearings* 2333–2334, 2368–2370)—argued on the House floor that the ban on secondary agreements should be extended to all industries. 105 Cong. Rec. 14343 (1959), II Leg. Hist. 1518.

The opponents of the Elliott bill rallied to pass the substitute Landrum-Griffin bill; its provisions made it unlawful for *any* labor organization and *any* employer to enter into an agreement whereby the employer agrees to "cease doing business with any other person." H.R. 8400, 86th Cong., 1st Sess. § 705(b)(1) (1959), I Leg. His. 683. Opponents of the Landrum-Griffin bill immediately complained that its broader prohibitions "would also outlaw legitimate forms of collective agreement." [18]

Had the Landrum-Griffin bill been enacted, the union signatory clauses at issue here would clearly have been unlawful. However, when the House and Senate bills were referred to the Conference Committee, the Senate conferees insisted on several changes in order to protect "traditional and essential rights of workingmen seeking to improve conditions of employment." [19] In particular, with respect to the ban on secondary agreements, the Senate insisted on exemptions for the garment industry and for agreements relating to work to be done at the site of a construction project. Thus, Senator Kennedy, the

[18] 105 Cong. Rec. 16590 (1959), II Leg. Hist. 1708 (joint statement of Rep. Thompson and Sen. Kennedy).

[19] 105 Cong. Rec. 17898 (1959), II Leg. Hist. 1431 (remarks of Sen. Kennedy).

chairman of the Conference Committee, reported back to his colleagues that "[t]he Senate insisted upon a qualification * * * for agreements relating to work to be done at the site of a construction project," and that this qualification, like the garment industry proviso, was "necessary to avoid serious damage to the pattern of collective bargaining in [the industry]." 105 Cong. Rec. 17899 (1959), II Leg. Hist. 1432. He added (105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433):

> [The construction industry proviso] is intended to preserve the present state of the law * * * with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> * * * * *
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e).[20]

The Conference Committee managers for the House expressed the same view, emphasizing that the final bill would not change the law respecting the validity of construction site subcontracting agreements since, "[t]o the extent that such agreements are legal today * * * the proviso would prevent such legality from being affected by section 8(e)" H.R. Rep. No. 1147, 86th Cong, 1st Sess. 39 (1959), I Leg Hist 943.[21]

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[20] At the same time, Senator Kennedy emphasized that the construction industry proviso "affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4)" with respect to "strikes and picketing to enforce the contracts excepted by the proviso." 105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433. He also noted that, since "the proviso relates only to the 'contracting or subcontracting of work to be done at the site of the construction,'" the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do work at the jobsite." *Ibid.*

[21] See also, 105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715 (remarks of Rep. Barden); 105 Cong. Rec. 18135 (1959), II Leg. Hist. 1721 (remarks of Rep. Thompson); 105 Cong. Rec. 19849 (1959), II Leg. Hist. 1823 (post-legislative memorandum by Sen. Dirksen); 105 Cong. Rec. 19772 (1959), II Leg. Hist. 1858 (post-legislative memorandum by Sen. Goldwater); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1119 (1960) ("This provision thus approves the general practice of the building trades to secure from a contractor a promise that he will not subcontract work on the job site to a nonunion contractor.").

Thus, although Congress was urged to pass legislation banning secondary subcontracting agreements in the construction industry and the House passed a bill that would have had this effect, the Senate refused to agree and successfully insisted on a proviso designed "to preserve the *status quo*" (*National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 637) with respect to such agreements.

C. The Construction Industry Proviso is Part of a Legislative Scheme that Accommodates the Act's Restraints on Labor Organizations to the Special Circumstances of the Construction Industry While Providing Some Limits on Top-down Organizing

The final bill that emerged from the Conference Committee in 1959 reflected a number of different interests: on the one hand, interests in accommodating the Act to the special employment patterns of the construction industry and in ameliorating legal constraints that uniquely affected unions seeking to organize construction employees and to preserve negotiated employee benefits in that industry; on the other, interests in maintaining some restraints on top-down organizing and, more generally, on the power of labor organizations with respect to employees who did not wish to be union members.

To understand the role of the Section 8(e) proviso in the overall scheme, it is essential to take note of the peculiarities of the construction industry as Congress understood them and of the way in which organizational and representational activities of construction industry unions are affected by other provisions of the Act, notably Sections 8(f) and 8(b)(7)(C) of the Act, 29 U.S.C. 158(f) and 158(b)(7)(C). Such a review reveals, contrary to petitioners' contentions, (1) that the proviso was designed to do more than merely forestall jobsite friction by empowering unions to negotiate clauses that would keep nonunion workers off the site whenever union workers are there, and (2) that sections of the Act other than Section 8(e) placed constraints on the ability of construction unions to engage in top-down organizing.

1. *Secondary subcontracting agreements relating to the contracting of jobsite work serveral legitimate purposes*

a. The problem of accommodating the provisions of the Act to the special circumstances of the construction industry had been the subject of intensive congressional review, commencing in 1951 [22] and culminating in the hearings on the 1959 amendments. Congress learned from this inquiry that employers in the construction industry generally looked to union hiring halls as the source of skilled labor for their projects and negotiated contracts of from one to three years' duration prescribing the terms upon which union labor would be supplied. Such agreements assured employers that a supply of skilled craftsmen would be available for immediate employment at those stages of a given project when the skills in question were required and facilitated the calculation of labor costs for the purpose of intelligently bidding on construction contracts. Such area-wide contracts also assured that the employees who were represented by the union and worked out of the union hiring hall would enjoy meaningful collective bargaining rights and unform terms and conditions of employment even while moving from jobsite to jobsite and employer to employer. [23]

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[22] *To Amend the National Labor Relations Act, 1947, with Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 29–37, 45–59 (1951).

[23] S. Rep. No. 187, 86th Cong., 1st Sess. 27–29 (1959), I. Leg. Hist. 423–424; H.R. Rep. No. 741, *supra*, at 19–20, I. Leg. Hist. 777–778; 105 Cong. Rec. 15541 (1959), II Leg. Hist. 1577–1578 (remarks of Reps. Thompson and Udall, incorporating speech by Speaker Rayburn); *Senate Hearings* 136–137 (statement of Archibald Cox); *Senate Hearings* 202–205, 215 (statement of Frank J. Rooney); *Senate Hearings* 492–502 (statement of Richard J. Gray); *House Hearings* 573–586 (statement of Frank J. Rooney); *House Hearings* 595 (statement of William E. Dunn); *House Hearings* 1727–1733 (statement of Richard J. Gray).

This pattern of bargaining did not, however, comport with legal doctrines developed with respect to other industries, barring so-called "prehire" agreements. See S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), I Leg. Hist. 424; H.R. Rep. No. 741, *supra*, at 19, I Leg. Hist. 777. Convinced that such agreements were useful to employers and employees alike in the construction industry, the Conference Committee adopted, as part of Section 8(f), the provision in the Senate bill legitimating such prehire agreements in that industry. H.R. Rep. No. 1147, *supra*, at 42, I Leg. Hist. 946.[24]

Section 8(f) permits construction unions that have not yet established their majority status to negotiate agreements covering employees who are "engaged (or who, upon their employment, will be engaged) in the building and construction industry." As the District of Columbia Circuit has pointed out, however (*Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 880 (D.C. Cir. 1980), cert. denied, No. 80–1257 (May 4, 1981), petition for reconsideration pending) "[s]tanding alone * * * such agreements are incapable of protecting the conditions they establish" because subcontracting is the usual practice in the construction industry and the workers are typically not attached to one particular employer but "are organized in employment pools to be hired out either by the contractor with whom they have an agreement or by a subcontractor to whom the work is

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[24] Congress' willingness so to exempt the construction industry from the Act's usual proscriptions against bargaining in advance of a union's establishing majority support among employees actually working on the job (see, *e.g.*, *ILGWU* v. *NLRB*, 366 U.S. 731, 733 (1961); *Crown Cork & Seal Co.*, 182 N.L.R.B. 657, 662 (1970)) was predicated in part upon its acceptance of the unanimous testimony at the hearings that, whatever might be the case with other unions who might seek to take advantage of Section 8(f), the major construction unions, who for decades had been negotiating area agreements with employers, were in fact the choice of the majority of the employees working under the agreements. *Senate Hearings* 137 (statement of Archibald Cox); *id.* at 192–193, 202–204 (statement of Frank J. Rooney); *id.* at 498 (statement of Richard J. Gray); *House Hearings* 574–575, 581–582, 586, 595–596 (statement of Frank J. Rooney); S. Rep. No. 187, *supra*, at 28, I Leg. Hist. 424.

assigned." [25] Thus construction workers do not share the interest of industrial sector employees in forbidding contracting out altogether; rather "their interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their employer works whether he does the work himself or subcontracts it out" (*id.* at 881).

By permitting contract clauses requiring that all construction site work be performed by contractors who are bound to honor the terms of the applicable area-wide agreement with the appropriate union, the construction industry proviso seeks to preserve the means that unions and employers in that industry had adopted for insuring not only that labor relations on particular job sites are harmonious (see subpoint b, *infra*) but also that the pool of workers represented by the union will enjoy the opportunities for regular employment and the continuity in wages, fringe benefits, and other terms and conditions of employment enjoyed by employees in more stable industries.[26]

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[25] As the court below explained (W. & R. Pet. App. 27): "The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union."

[26] Petitioners inaccurately maintain that legitimate union interests are fully served by primary union standards clauses—*i.e.*, clauses that restrict subcontracting clauses in the construction industry (W. & R. Br. 40; Oregon-agreement—and that therefore the union interest in maintaining contract benefits is not a valid basis for justifying secondary union signatory subcontracting clauses in the construction industry (W. & R. Br. 40, Oregon-AGC Br. 38). Primary union standards clauses, however, are not within Section 8(e) at all and may be negotiated by any union (see *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, 386 U.S. at 644–645 & n. 40).

The construction industry proviso, by contrast, affords construction unions a limited right to negotiate subcontracting agreements that implicate the signatory employers in union efforts to obtain contract benefits for the union-represented pool of casual employees generally. See *NLRB* v. *National Maritime Union*, *supra*, 486 F.2d at 914 (distinguishing the rights of construction and maritime workers in light of the proviso). Union standards clauses are insufficient to secure the legitimate secondary objectives protected by the proviso. Thus, the interest of the pool of union-represented employees in securing job opportunities under the terms of the particular agreement

b. As this Court noted in *Connell* (421 U.S. at 629; footnote omitted), the construction industry proviso was apparently also intended to serve as "a partial substitute for an attempt to override this Court's decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951)."

At the time Congress was considering the proper scope of Section 8(e), it had before it several proposals—*e.g.*, § 702(d) of H.R. 8342, 86th Cong., 1st Sess. (1959), I Leg. Hist. 752–753 (the Elliott bill)—that would effectively overrule the holding in *Denver* that picketing a general contractor's entire project in order to protest the presence of a nonunion subcontractor is an illegal secondary boycott. "It was partly in this frame of reference that the [construction industry] proviso to Section 8(e) was written * * *." 105 Cong. Rec. 20005 (1959), II Leg. Hist. 1861 (remarks of Rep. Kearns).

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negotiated on their behalf is plainly frustrated if jobsite work is awarded to employers who merely match union standards but do not hire these employees in accordance with the referral provisions in the union contract.

Similarly, the union interest in securing continuity of pension, health care, and other fringe benefits for the union-represented pool of employees cannot be assured unless work is awarded to employers signatory to the particular union's agreement. For in the construction industry, fringe benefits typically are provided through contributions to a trust fund jointly administered by the union and employer parties to a collective bargaining agreement, pursuant to Section 302 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. 186. Section 302 forbids payments into such funds except if "specified in a written agreement with the employer." See *Walsh* v. *Schlecht*, 429 U.S. 401, 403–404 n. 1 (1977). Accordingly, unless the subcontractor performing the construction work is signatory to the applicable union contract, it cannot contribute to the fringe benefit trust funds. Further, the alternative approved in *Walsh*—requiring a signatory contractor who subcontracts to a nonsignatory firm itself to make contributions measured by the hours worked by the subcontractor's employees—solves the problem only in part. The flow of contributions into the fund is thereby maintained, but because of the difficulty of ascertaining which signatory employer and which union-represented employees would have been awarded the work in the absence of the subcontract to the nonunion firm, there is no practical means to credit any particular member of the union-represented pool of employees with hours worked for the purposes of later benefit calculations.

Those wishing to overrule *Denver* criticized it for numerous reasons, *e.g.*, that contractors and subcontractors working together on a common enterprise at a single site are not the sort of neutrals that the secondary boycott provisions were designed to protect; that the various craftsmen, although working for different employers, have a close community of interest as they work side by side, and the wages and working conditions of one trade may, in those circumstances, affect the others; that the *Denver* rule unfairly denies construction workers the right, enjoyed by industrial workers, to engage in economic picketing at one's place of employment; and that, in contrast to "true" secondary boycott situations, construction site disputes are confined to a limited area and do not affect employers operating in geographically distinct markets.[27] That the *Denver* rule could result in uneasy employee relationships on the jobsite owing to the presence of nonunion workers in the midst of union workers was an additional criticism, although, as the court below observed (W. & R. Pet. App. 33), the "problem of shoulder-to-shoulder friction between union and nonunion workers" at the job site received "very little emphasis."

The proviso was a response to the *Denver* criticisms insofar as it permitted unions to enter into agreements that would prohibit the subcontracting of jobsite work to nonunion firms, although they still could not picket the entire site to protest the presence of a nonunion firm actually on the site. But since, as we have shown (pages 22–24, *supra*), the proviso served other important purposes as well, and since, even as a response to *Denver*, it was only partly concerned with "shoulder-to-shoulder friction," there is no merit to petitioners' contention that the proviso covers only subcontracting clauses focused solely on preventing the employment of union and nonunion workers on the same jobsite at the same time. Indeed, this claim would

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[27] 105 Cong. Rec. 17881 (1959), II Leg. Hist. 1425 (remarks of Sen. Morse); 105 Cong. Rec. 15541 (1959), II Leg. Hist. 1577 (memorandum by Reps. Thompson and Udall); 105 Cong. Rec. 15551–15552 (1959), II Leg. Hist. 1588 (memorandum by Rep. Elliott); 105 Cong. Rec. 15852 (1959), II Leg. Hist. 1684 (remarks by Rep. Goodell).

attribute to Congress an intent to protect only clauses that, so far as the evidence shows, no one had ever entered into, or even drafted.

2. *Construing the proviso as privileging subcontracting clauses like those at issue here does not leave construction unions free to engage in unlimited top-down organizing*

Petitioners contend (W. & R. Br. 15–17, 27–30; P.N.W. Br. 13–14; Oregon-AGC Br. 20–29) that the subcontracting clauses here have a "top-down" organizing effect in that they would require an employer, in order to obtain a subcontract, to force its employees to become members of the union and to accept the union as their representative, not only on the first project but on all of that employer's future projects in the area. Therefore, they contend, to interpret the construction industry proviso as privileging subcontracting clauses that are negotiated or sought in the context of a collective bargaining relationship, but are not limited to jobsites where union and nonunion employees are working together, ignores the congressional concern about "top-down" organizing which the *Connell* Court emphasized. This argument misconceives the operation of subcontracting clauses in the construction industry and the nature of the accommodation which Congress made in that industry.

As noted above (pages 15–21, *supra*), persons affected by secondary subcontracting agreements complained that collective bargaining agreements containing such clauses created an unfair, "top-down" organizing pressure on the organizational rights of employees and the reciprocal duties of employers, and they sought legislative relief—the outlawing of collectively-bargained secondary subcontracting agreements—that Congress declined to give. Congress did not, however, disregard the interests of employers and employees who might be affected by such clauses. Rather, it decided to use other statutory means to moderate the effects of competition for jobs and to assure that the Act's policies of employee free choice and majority rule would be given effect in a manner suited to the practical realities of the construction industry.

Thus, a subcontractor cannot be subjected to unlimited picketing to force it to enter into a union agreement regardless of the wishes of its employees. Unless the picketing union files an election petition within a reasonable period of time, not to exceed 30 days, such picketing would be a violation of Section 8(b)(7)(C) of the Act.[28] Moreover, should the subcontractor enter into a prehire agreement with the union, the express terms of Section 8(f) of the Act permit its employees to challenge the union's representative status by filing an election petition with the Board. And, the subcontractor itself, if

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[28] Contrary to petitioners' assertion (*e.g.*, W. & R. Br. 20–21; P.N.W. Br. 31), picketing for a prehire agreement, as well as picketing for a conventional Section 9(a) agreement, is governed by the terms of Section 8(b)(7)(C) and is not unlawful altogether. It is true that Congress gave assurances, in connection with Section 8(f), that it did not "authorize" construction unions that had not yet established their majority status to picket for such agreements. H.R. Rep. No. 1147, *supra*, at 42, I Leg. Hist. 946; 105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715 (remarks of Rep. Barden, a House floor leader and one of the conferees) incorporating 104 Cong. Rec. 11308 (1958) (colloquy of Senators Holland and Kennedy). However, these assurances were not equivalent to forbidding stranger picketing (105 Cong. Rec. 18134–18135 (1959), II Leg. Hist. 1721 (remarks of Rep. Thompson, also a conferee and House floor manager), and for this reason were unsatisfactory to the industry. *Senate Hearings* 215 (statement of Frank J. Rooney); *House Hearings* 610 (statement of Frank J. Rooney). Rather, the compromise that emerged in 1959 was to allow picketing for a prehire agreement subject to the limitations of Section 8(b)(7)(C). Such picketing thus loses all protection once it becomes clear that the union has no intention of ever putting its majority status to the test of an election, *i.e.*, after the 30-day period has expired without the filing of an operative election petition, or when the circumstances are such that an election satisfying the requirements of Section 8(b)(7)(C) would be an impossibility. See *Local 542, Int'l Union of Operating Engineers (R. S. Noonan, Inc.)*, 142 N.L.R.B. 1132, 1135 (1963), enforced, 331 F.2d 99, 105 (3d Cir.), cert. denied, 379 U.S. 889 (1964); *Local 86, Brotherhood of Painters (Carpet Control, Inc.)*, 216 N.L.R.B. 1127, 1132–1133 (1975). See also *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978) (picketing to enforce prehire agreement is subject to Section 8(b)(7)(C)); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 186 (1978) (picketing to secure prehire agreement "was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C)").

it does not have a stable workforce among whom the union has secured a majority, is free under the Act to repudiate the agreement at any project on which the union has not demonstrated that it represents a majority of its employees. See *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335 (1978); *Giordano Construction Co.*, 256 N.L.R.B. No. 10 (May 18, 1981), 107 L.R.R.M. 1164, 1165–1166.[29]

In addition, even where construction unions are successful in negotiating collective bargaining agreements that require general contractors and subcontractors to look to the union hiring hall as the source of construction labor. Sections 8(a)(3) and 8(b)(2) of the Act, 29 U.S.C. 158(a)(3) and 158(b)(2), require that the union refer members and nonmembers alike to available jobs[30] and, further, limit the obligations of union membership that may be required after seven days under lawful union security clauses to the normal financial obligations of membership.[31] Thus, nonunion employees are not frozen out of the job market by these agreements as petitioners maintain.

Finally, because Congress did not overrule the *Denver Building Trades* decision (see pages 25–26, *supra*), employees working for firms with whom a construction union has a primary dispute are protected against secondary picketing designed to force them off their current job. As the court below stated (W. & R. Pet. App. 41–42), in a holding not questioned here, even where construction unions have negotiated secondary clauses lawful under the proviso, they may not enforce them by picketing or other forms of self help, but must rely on litigation to obtain relief for the contract violation. See H.R. Rep. No. 1147, *supra*, at 39, I Leg. Hist. 943; 105 Cong.

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[29] Of course to the extent that the subcontractor employs a stable complement of employees, a majority of whom support the union, its executing and honoring the union's contract on successive projects presents no problem of top-down organising but is fully consistent with the majoritarian principles of Section 9(a) of the Act. See *Hageman Underground Construction*, 253 N.L.R.B. 60, 62–63 (1980).

[30] See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40–42 (1954); *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 673–677 (1961).

[31] See *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1085–1087 (9th Cir. 1975); *Local 1104, Communication Workers of America* v. *NLRB*, 520 F.2d 411, 417–420 (2d Cir. 1975), cert. denied, 423 U.S. 1051 (1976).

Rec. 19772 (1959), II Leg. Hist. 1830 (post-enactment memorandum of Sen. Goldwater).

These protections insure that Congress' approval of collectively-bargained secondary subcontracting agreements relating to construction site work does not, contrary to petitioners, entail taking the ultimate decision concerning union representation from employees and giving it to employers. Consideration of the agreements here confirms this conclusion. The agreements, which were sought from employers with whom the unions had longstanding bargaining relationships, require signatory employers to obtain their employees from the unions' hiring halls (J.A. I 37–39; J.A. II 17–24). Accordingly, a nonunion employer who signs the agreement in order to obtain work on a particular project would employ workers who were already members of the union, or who, although not union members, at least were willing to seek work through the union hiring hall and to accept the financial obligations of membership after seven days, as a condition of further employment under a valid union security provision. If the signatory employer already has a complement of employees, these employees would be free to choose whether to accept "by name" referrals (J.A. I 37–38; J.A. II 19) through the hiring hall—and then either to work under the contract or to exercise their Section 8(f) right to repudiate it—or to seek employment elsewhere. In any event, the employees hired in accordance with the contract's nondiscriminatory terms would make the ultimate decision with respect to unionization.

Finally, to the extent that, notwithstanding these various protections, collectively-bargained union signatory subcontracting clauses nevertheless exert some top-down organizing pressure upon employees, it must be recognized, as the court below concluded (W. & R. Pet. App. 35; footnote omitted):

> There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is

still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.

D. Granting Proviso Protection to Union Signatory Subcontracting Clauses Sought or Obtained in the Context of a Collective Bargaining Relationship is Consistent With this Court's Decision in *Connell*

1. In *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100, supra*, an antitrust case, the Court was not asked, as here, to decide the legality of secondary construction site subcontracting clauses sought or obtained in the kind of established collective bargaining relationships traditional in the construction industry. Rather, the Court was confronted with a novel organizational tactic: "stranger" picketing aimed at pressuring selected employers into entering an agreement with a single term—a union signatory subcontracting clause falling within the literal words of the construction industry proviso—and deliberately structured to avoid any possible claim that the union sought or obtained this agreement in the context of a collective bargaining relationship.

Thus, the union picketed Connell, as well as other carefully targeted general contractors working in the Dallas, Texas, area, for the sole purpose of compelling such contractors to agree that, in letting subcontracts for the performance of mechanical work, they would deal only with firms that were parties to that union's current collective bargaining agreements. The union had no collective bargaining relationship with Connell, whether under Section 8(f) or Section 9(a) of the Act, and the unior expressly disclaimed any interest in representing any of Connell's employees. Further, Connell, like the other targeted employers, uniformly subcontracted its mechanical work to other employers and never itself employed any workers in the craft the union represented. Because, on these facts, the union's picketing demonstrably had no recognitional or organizational

purpose with respect to Connell's employees, it fell outside the restrictions that Section 8(b)(7) places on recognitional and organizational picketing. See *Dallas Building & Construction Trades Council* v. *NLRB*, 396 F.2d 677, 682 n.8 (D.C. Cir. 1968) ("picketing is permissible [under Section 8(b)(7)] if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractor's own employees"). And this was precisely the union's purpose.[32]

As a result of the "stranger union" picketing, Connell entered into the secondary subcontracting agreement under protest and filed suit to annul the agreement as an illegal restraint of trade under the Sherman Act. The union defended on the ground that the agreement sought was protected by the express words of the construction industry proviso to Section 8(e) of the NLRA, and that the picketing was therefore lawful under Section 8(b)(4)(A), 29 U.S.C. 158(b)(4)(A) (see pages 36–43, *infra*). Since the union had already demonstrated the absence of any objective to establish any form of a collective bargaining relationship (and thereby evaded the reach of Section 8(b)(7)), acceptance of this argument would have given the union a means to engage in "stranger" picketing for secondary agreements with impunity;[33] and because the union represented no employees of Connell, it was subject to none of the pressures

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[32] As the court of appeals explained in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 483 F.2d 1154, 1157–1158 (5th Cir. 1973), rev'd on other grounds, 421 U.S. 616 (1975), the case was "another phase of the struggle between the trade unions in the construction industry and general contractors in Dallas," and represented a conscious attempt by the unions to refine their picketing tactics in a manner that would permit them to exploit the limitations of Section 8(b)(7) that had been noted in *Dallas Building Trades, supra*. See also W. & R. Pet. App. 22 n. 24.

[33] Such a result would also mean that construction workers would enjoy the same rights as garment workers to engage in unlimited picketing to obtain secondary subcontracting agreements outside of any contemplated collective-bargaining relationship between the picketing union and the "stranger" employer. See *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974); *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 212 N.L.R.B. 735 (1974)

and incentives that are a normal part of the collective-bargaining process.[34]

The employer in *Connell* responded to the union's argument for proviso protection by contending that, despite the proviso's unqualified language, "Congress intended only to allow subcontracting agreements within the context of a collective bargaining relationship * * * [and] did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors" (421 U.S. at 627–628).

Against this background and with the issues thus framed, this Court declined to read the construction industry proviso as broadly as the union urged, "[a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing." 421 U.S. at 633. Accordingly, the Court construed the construction industry proviso exemption as applicable "only to agreements in the

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(construing Section 8(b)(7)(C) in light of the garment industry proviso to Section 8(e)). As the Court noted in *Connell*, however, Congress showed a greater solicitude for the problems confronting garment workers and their unions, and did not intend that construction workers should enjoy precisely the same rights. 421 U.S. at 628–630, 633 n.13 (See also page 20, note 10, *supra*.) Thus, the second proviso to Section 8(e) privileges secondary subcontracting agreements in the garment industry, and unlike the construction industry proviso exempts efforts to *enforce* those agreements from the prohibitions of the Act, including Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B).

[34] As the court below observed (W. & R. Pet. App. 36): "If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands." For example, the employer could offer other benefits such as higher wages, instead of the subcontracting clause, which may be more attractive to the employees represented by the union. (See *Dallas Building & Construction Trades Council* v. *NLRB*, *supra*, 396 F.2d at 681, where the employer association rejected secondary clauses in bargaining with the locals that were the recognized representatives of their employees, and in exchange the locals accepted contracts with other economic benefits.) The employer thus may be able to put a brake on the union's economic pressure which, absent an established bargaining relationship with the union, it could not impose.

context of collective-bargaining relationships" (*ibid.*).[35] The Court thereby assured that stranger picketing for secondary subcontracting clauses could not be used as an unlimited means for "top-down" organizing. Rather, picketing a contractor whose employees the union sought to represent for a collective-bargaining agreement containing a secondary subcontracting clause would continue to be restricted under Section 8(b)(7)(C) to a reasonable period, not to exceed 30 days, unless the picketing union had filed an election petition;[36] and the new tactic of picketing for a secondary clause from a contractor who had no employees in the classifications covered by the agreement would be proscribed altogether by Section 8(b)(4)(A).[37]

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[35] Similarly, with respect to the union's potential antitrust liability, the Court recognized that significantly different antitrust issues would have been presented had the subcontracting clause been proffered as part of a lawful collective bargaining agreement with Connell. As the Court stated (421 U.S. at 625–626; citations omitted): "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement. In this case [the union] had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market."

[36] See *Building & Construction Trades Council of Philadelphia (Samuel E. Long, Inc.)*, 201 N.L.R.B. 321, 323–325 (1973), enforced mem., 485 F.2d 680 (3d Cir. 1973), cert. denied, 416 U.S. 937 (1974).

[37] Where, as here, a union has established a Section 9(a) bargaining relationship with a contractor, picketing of that contractor, as petitioners note (W. & B. Br. 49; Oregon-AGC Br. 47–48), is not subject to the restrictions of Section 8(b)(7), which only proscribe picketing "having as its target forcing or requiring an employer's *initial* acceptance of the union as the bargaining representative of his employees." *NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335, 343 (1978), quoting from *Building & Construction Trades Council of Santa Barbara (Sullivan Electric Co.)*, 146 N.L.R.B. 1086, 1087 (1964) (emphasis added). Section 7 of the Act, 29 U.S.C. 157 gives construction unions, who have established a Section 9(a) bargaining relationship with an employer the right, enjoyed by other unions who are the employers' Section 9(a) representatives, to engage in peaceful picketing or other economic pressure in support of their lawful contract demands. See

2. The Court did suggest one possible exception to the proscription against secondary subcontracting agreements outside of a collective-bargaining relationship, noting that, "in light of congressional references to the *Denver Building Trades* problem," the protection of the Section 8(e) proviso extends "possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. However, contrary to petitioners, this reference to the *Denver Building Trades* problem does not support their contention (W. & R. Br. 37–39; P.N.W. Br. 50–51) that the Court thereby narrowly construed the proviso to privilege *only* subcontracting clauses aimed at precluding nonunion employees from working alongside union employees. Petitioners read conjunctively the Court's statement that the authorization of the Section 8(e) proviso "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. But, it is plain that the statement is properly read disjunctively. Moreover, petitioners' conjunctive reading of the Court's statement would necessarily mean that the function of the proviso would be limited to alleviating friction caused by having union and nonunion employees working on the same jobsite (see W. & R. Br. 30–33; P.N.W. Br. 35–39; Oregon-AGC Br. 33–35), but, as we have shown (pages 22–27, *supra*), the proviso's purpose was broader than that. Indeed, *Connell* acknowledges that, in *National Woodwork Mfrs. Ass'n* v. *NLRB*, *supra*, the Court had ascribed a broader purpose to this proviso—*i.e.*, a recognition of "the close community interests" on the jobsite (see 421 U.S. at 630). That community of interests among union-represented employees can be jeopardized by subcontracts to firms who do not abide by the union agreement regardless of whether those employees happen to be on the jobsite at the same time that nonunion employees are there (see page 24 note 26, *supra*).

NLRB v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960). In such circumstances, however, as noted above (page 33, note 34, *supra*), the employer can resort to bargaining strategies of its own in response to union demands.

II. SECTION 8(b)(4)(A) OF THE ACT DOES NOT PROSCRIBE PICKETING TO OBTAIN UNION SIGNATORY SUBCONTRACTING CLAUSES PRIVILEGED BY THE CONSTRUCTION INDUSTRY PROVISO

Petitioner Woelke (Br. 43–49) and amicus Chamber of Commerce (Chamber Br. 6–22) urge that, even if the proviso is properly read to privilege union signatory subcontracting clauses, that privilege extends only to agreements that have been entered into voluntarily.[38] As every court of appeals which has considered that question has held,[39] however, there is simply no basis in the language of the Act to support that contention.

1. The express terms of Section 8(b)(4)(A) prohibit coercing any person "to enter into any agreement which is prohibited by section 8(e)." As the court below observed (W. & R. Pet. App. 40–41), the negative implication of this language is that it is lawful to picket to secure an agreement which, by virtue of

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[38] This issue is presented only on the facts of *Woelke & Romero* since there is no claim that the Engineers in *Pacific Northwest* picketed to secure the subcontracting clause contained in their collective-bargaining agreement with AGC. Although addressed by the court of appeals (W. & R. Pet. App. 40–41), the issue was not raised before the Board, either by the General Counsel or by Woelke, the charging party in that case (W. & R. Pet. App. 81–82). Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes consideration of it on review. See, *e.g.*, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311–312 n.10 (1979). Therefore, this issue is not properly before the Court and we suggest that, as to it, certiorari was improvidently granted. Because the grant of certiorari was not limited, however, we address it here.

[39] *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636, 641 (3d Cir. 1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Building & Construction Trades Council* v. *NLRB*, 328 F.2d 540 (D.C. Cir. 1964); *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB*, 323 F.2d 422 (9th Cir. 1963) (hereinafter *"Colson & Stevens"*). The Board initially adopted the contrary view, see *Construction, Production & Maintenance Laborers Union, Local 383 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650 (1962), enforcement denied in relevant part, 323 F.2d 422 (9th Cir. 1963), but abandoned it two years later following its uniform rejection by the courts. See *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), enforcement denied on other grounds, 352 F.2d 696, 698–700 (D.C. Cir. 1965).

the construction industry proviso, is not "prohibited by section 8(e)." As the Ninth Circuit explained in *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB* (*Colson & Stevens*), 323 F.2d 422, 424 (1963):

> It may well be that § 8(e) itself is addressed only to voluntary agreements; [however] it is not § 8(e) but § 8(b)(4)(A) which prohibits coercion [and] * * * [Section 8(b)(4)(A)] prohibits it only where the object of the coercion is an agreement which is "prohibited" by § 8(e) from voluntarily being reached. * * * [The] two sections read together, as they are intended to be read, say most clearly that if [a subcontracting] agreement may voluntarily be reached, picketing to secure it is not made unlawful.

See also *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636 (3d Cir. 1964).[40]

Not only does the plain language of the amendments permit unions to picket employers to secure collective bargaining agreements containing secondary subcontracting clauses protected by the proviso, but, as we now show, the legislative history of the 1959 amendments also supports the conclusion that this result is in accord with Congress' intent.

2. As we have explained (page 18, *supra*), Congress' efforts to reform the law concerning secondary agreements took place against the background of the decision in *Local 1976, United Brotherhood of Carpenters* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958). In *Sand Door* the Court held that hot cargo provisions in collective bargaining agreements, although lawful when executed, were nevertheless not a valid defense to a charge of secondary picketing to enforce those clauses. An "important consideration" underlying this holding was the Court's

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[40] The analysis of the new amendments prepared for a subcommittee of the Senate Committee on Labor and Public Welfare is to the same effect (Senate Committee Section-by-Section Analysis, 86th Cong., 1st Sess. 20 (1959), I Leg. Hist. 966), stating that Section 8(b)(4)(A) makes it an unfair labor practice for a union "to induce an individual or to 'threaten, coerce, or restrain an employer' to enter into an agreement prohibited by section 8(e)" but that "[t]he prohibition against 'hot cargo' agreements does not apply to the clothing and apparel industry, nor to the construction industry relating to work to be done at the construction site."

awareness that, in "the practicalities of the collective-bargaining process," such clauses might themselves have been the result of strike pressure brought to bear on the secondary employer. *Id.* at 106.[41]

Congress was similarly informed of the practicalities of bargaining, and its belief that existing law did not prohibit picketing and other forms of pressure to secure secondary clauses was the impetus for the proposals leading to the enactment of Section 8(b)(4)(A).[42] Thus, in arguing for the necessity of

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[41] Thus, the Court noted that the employer's agreement to the hot cargo clause "may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act." 357 U.S. at 106. Accordingly, the Court concluded, "the freedom of choice for the employer contemplated by § 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy." 357 U.S. at 105. The Chamber is therefore mistaken in contending (Br. 6–7) that *Sand Door* indicates that strike pressure to obtain a secondary agreement was unlawful prior to 1959.

[42] Section 8(b)(4)(A) did not appear in either the Senate or House bills, but was added in the Conference. The Senate bill sought to deal with the matter by changing the Act's provisions regulating collective bargaining: as the result of an amendment introduced by Senator Smathers on the floor (105 Cong. Rec. 6730 (1959), II Leg. Hist. 1242–1243), the Senate bill, as passed, stated that the obligation to bargain imposed by Sections 8(a)(5) and 8(b)(3) of the Act included "the mutual obligation * * * to refrain from proposing, insisting upon, or conditioning any contractual provision upon any clause violating the provisions of section 8(e)." S. 1555, 86th Cong., 1st Sess. § 707(b) (1959), I Leg. Hist. 582. Because Section 8(e) in the Senate bill was limited to the trucking industry, its ban on picketing and other forms of "insisting" on secondary agreements was equally limited.

The Landrum-Griffin bill, on the other hand, proposed amending the existing secondary boycott provisions in Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. (1958 ed.) 158(b)(4)(A) (which, in relevant part, is similar to Section 8(b)(4)(B) of the present Act) so as to ban any strikes, threats, or other coercive measures with the object of "* * * requiring any person * * * to agree to cease, using * * * or otherwise dealing in the products of any other producer, processor, or manufacturer * * * or *agree to* cease, doing business with any other person * * *." 105 Cong. Rec. 15890 (1959), II Leg. Hist. 1700; H.R. 8400, 86th Cong., 1st Sess., § 705(a) (1959), I Leg. Hist. 681 (emphasis added).

The provision ultimately enacted as Section 8(b)(4)(A)—limiting the ban of the statute only to those strikes and other coercive pressures aimed at

the passage of the Landrum-Griffin bill and the banning of hot cargo agreements in all industries, Representative Griffin complained that, although under existing law it was unlawful to strike to force secondary employers to cease handling certain products or to cease doing business with some other person, "[t]he law * * * does not prohibit resort to the same kind of activity to force such employers to sign contracts or agreements not to handle or transport goods coming from a source characterized by the union as 'unfair.' 105 Cong. Rec. 14347 (1959), II Leg. Hist. 1523. Likewise Representative Rhodes characterized as "a much needed reform" the Landrum-Griffin provisions making it "illegal for unions to insist upon hot cargo clauses being inserted into collective bargaining agreements," and he noted in particular the need to ban such hot cargo clauses in the construction industry. 105 Cong. Rec. 15545 (1959), II Leg. Hist. 1581.

3. Had Congress enacted the Landrum-Griffin bill, it would be unlawful for a construction union—or any union—to picket for any secondary agreement requiring any person to cease doing business with any other person. However, as shown above (pages 18–21 & note 42, *supra*), in the Conference the Senate insisted that agreements relating to the contracting of work to be performed at a construction site be exempted from Section 8(e) and, further, secured the House's acceptance of the Senate view that any ban on picketing to secure secondary agreements should be expressly linked—and limited—by the terms of Section 8(e) itself.

As the sponsors of the compromise in both the House and Senate recognized, the effect of the Conference agreement was to treat the construction industry like any other industry with

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securing agreements prohibited by Section 8(e)—appears to have been suggested by the Senate conferees. See 105 Cong. Rec. 17333–17334 (1959), II Leg. Hist. 1382–1383 (S. Res. 181, 86th Cong., 1st Sess. (1959), submitted by Sen. Kennedy). In accepting the new measure as part of a compromise that ended the deadlock that had developed in the Conference (see 105 Cong. Rec. 17325–17326 (1959), II Leg. Hist. 1375 (remarks of Sen. Dirksen); 105 Cong. Rec. 17327–17328 (1959), II Leg. Hist. 1377–1378 (remarks of Sen. Kennedy)), the House agreed to the deletion of the phrase "or agree to cease" from the restrictions on secondary picketing now contained in Section 8(b)(4)(B) of the amended Act. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 38 (1959), I Leg. Hist. 942. See *Colson & Stevens, supra*, 323 F.2d at 426–427.

respect to secondary agreements relating to products delivered to the jobsite, with the result that hot goods agreements of the type presented in *Sand Door* were fully subject to the new provisions. With this exception, however, the effect of the Conference agreement was to leave the law with respect to secondary agreements and picketing in the construction industry unchanged. Thus, on the one hand, Congress did not remove the restrictions on secondary jobsite picketing that had already been established under the *Denver Building Trades* case and under *Sand Door*. On the other hand, with respect to the construction site subcontracting agreements protected by the proviso, Congress did not add to the restrictions, but left unchanged existing law, "with respect to the legality of a strike to obtain such a contract." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39–40 (1959); I Leg. Hist. 943–944; 105 Cong. Rec. 17900 (1959), II Leg. Hist. 1433 (remarks of Sen. Kennedy).

Contrary to the Chamber (Br. 20–21), there is ample "sense" in Congress' compromise decision, on the one hand, to retain the *Sand Door* restrictions on jobsite picketing to enforce secondary clauses and, on the other hand, to continue to permit construction unions to picket to obtain collective bargaining agreements containing secondary subcontracting clauses relating to jobsite work. The former rule limits the opportunity for the kind of secondary jobsite picketing proscribed in *Denver*. The latter rule affords construction unions a channel for protecting their legitimate interests—assurance of continuity of work, uniform contract terms, and avoidance of *Denver* "friction"—by picketing for collective agreements either at contract renewal time (as here) or in the context of lawful organizational and recognitional efforts conducted at the times and within the limitations prescribed by Section 8(b)(7).

The Chamber similarly errs in arguing (Br. 8–10) that analysis of Board decisions prior to the 1959 amendments demonstrates that the Conference agreement did *not* preserve rights of construction unions to picket for secondary agreements relating to the subcontracting of jobsite work because there were no such rights to preserve. First, as we have shown, Congress *believed* that existing law did not bar such picket-

ing.[43] The Chamber's argument thus disregards the canon that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828 (1976). In any event, contrary to the Chamber's analysis, Board law at the time of the amendments fully supported the congressional understanding regarding the lawfulness of picketing for secondary agreements.

Prior to the enactment of the 1959 amendments, the Board had not resolved the question whether it was a violation of Section 8(b)(4) for a union to strike or picket an employer for an agreement that did not seek to disrupt ongoing projects but only to boycott nonunion firms in the awarding of future contracts. Thus, in *Local 47, Teamsters (Texas Industries, Inc.)*, 112 N.L.R.B. 923 (1955), enforced, 234 F.2d 296 (5th Cir. 1956), the Board, although holding that the union violated Section 8(b)(4) by picketing the general contractors (Bateson and McCann) for a contract clause that required subcontractors to abide by the applicable union agreement, found that the object of the picketing was to force the general contractors to cease doing business with existing and identified subcontractors working on the jobsite (112 N.L.R.B. at 924–925). The Board, however, specifically reserved the question whether the union's picketing also was unlawful "insofar as it sought to regulate future dealings by Bateson and McCann with such subcontractors (not as yet identified) as might refuse to meet the Union's wage standards" (*id.* at 925 n. 2).[44]

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[43] The statement of Representative Barden that the proviso "permits the making of voluntary agreements" (105 Cong. Rec. 18128 (1959), II Leg. Hist. 1715) is not inconsistent with this view. Moreover, as shown, Congress was aware that "voluntary" agreements to secondary clauses were often the product of economic pressure.

[44] On its facts and rationale, therefore, the conduct proscribed in *Texas Industries* was substantially the same as the conduct proscribed in *Denver Building Trades*, and the fact that the union sought to have the general contractor sign an agreement to oust the offending primary did not materially contribute to the offense. Significantly, the single reference to the *Texas Industries* case in the legislative history is in a *Denver* context: in explaining why they would support the Landrum-Griffin bill on the floor of the House,

Likewise, although in *Bricklayers, Masons & Plasterers (Selby-Battersby & Co.)*, 117 N.L.R.B. 366 (1957), enforcement denied, 259 F.2d 151 (4th Cir. 1958), cert. denied, 359 U.S. 952 (1959), the trial examiner considered the issue reserved in *Texas Industries* and held that Section 8(b)(4) of the Taft-Hartley Act barred picketing that did not seek to disrupt any projects then under construction but only sought an agreement requiring the contractor to refrain in the future from doing business with a class of otherwise unidentified open shop contractors in the Baltimore area (117 N.L.R.B. at 383), the Board dismissed the complaint on other grounds (*id.* at 367–371), and as a result neither the Board nor the reviewing court addressed this issue prior to the 1959 amendments. Accordingly, insofar as Congress, in enacting Sections 8(e) and 8(b)(4)(A), sought to preserve Board law governing picketing aimed at securing secondary subcontracting clauses, it preserved a body of law that did not prohibit picketing for an agreement that sought only to regulate future projects and did not seek to disrupt an existing project.[45]

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the nine dissenters from the Elliott bill complained that the committee bill's legalization of secondary boycotts at construction sites would weaken existing law making it illegal for a union "to picket a general contractor with whom it has an agreement * * * to force the general contractor to * * * get rid of a subcontractor with whom the union is having a labor dispute." H.R. Rep. No. 741, 86th Cong., 1st Sess. 97 (1959), I Leg. Hist. 855.

[45] *Bricklayers, Masons & Plasterers (Selby-Battersby & Co.)*, 126 N.L.R.B. 1179, 1181–1182 (1959), extensively relied upon by the Chamber (Br. 8–11), was decided on December 29, 1959—more than three months after the President's September 14 approval of the 1959 amendments. Although that decision could be read as holding that a strike to obtain a clause barring subcontracting to nonunion firms violated Section 8(b)(4)(A) of the Taft-Hartley Act, 29 U.S.C. (1958 ed.) 158(b)(4)(A) (which is similar to Section 8(b)(4)(B) of the present Act) (but see 125 N.L.R.B. at 1182), that decision does not illustrate the state of the law prior to the 1959 amendments. Also, it is not in accord with the Board's more considered views concerning the relationship between the newly enacted Section 8(b)(4)(A) and the portion of the former Section 8(b)(4)(A), that, as amended, is now Section 8(b)(4)(B). See *Northeastern Indiana Building & Con-*

In sum, the relevant statutory language and its legislative history both support the Board's conclusion that union signatory clauses regulating the contracting of construction site work, when sought or obtained in the context of a lawful collective bargaining relationship, are privileged by the construction industry proviso to Section 8(e) of the Act and that a union may picket to obtain such clauses without violating Section 8(b)(4)(A). Petitioners' argument to the contrary thus amounts to a request that "the Board or the courts * * * engage in a legislative act" (*Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 674 (1961)) to prohibit an established and legitimate industrial practice that Congress carefully considered and declined to make unlawful.[46]

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struction Trades Council (Centlivre Village Apartments), supra, 148 N.L.R.B. at 857–858; *Columbus Building & Construction Trades Council (Merchandise Properties, Inc.)*, 149 N.L.R.B. 82, 83–84 (1964), enforced *sub nom. NLRB* v. *IBEW, Local Union No. 683*, 359 F.2d 385 (6th Cir. 1966); *Los Angeles Building & Construction Trades Council (Church's Fried Chicken)*, 183 N.L.R.B. 1032, 1037–1038 (1970); *Los Angeles Building & Construction Trades Council (B & J Investment Co.)*, 214 N.L.R.B. 562, 563 (1974).

[46] Petitioner Pacific Northwest (Br. 59–60) and amicus Chamber (Br. 20–21) suggest that since, in enacting Section 8(f) and Section 8(b)(7)(C), Congress sought to limit picketing aimed at obtaining a bargaining agreement directly from a subcontractor (see page 38, note 28, *supra*), it is illogical to attribute to Congress an intention to permit unlimited picketing to obtain a collective bargaining agreement containing a union signatory subcontracting clause from a general contractor. As the court below recognized, however, so far as the rights of subcontractors and their employees are concerned, "they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered" into (W. & R. Pet. App. 41). Further, as we have shown (pages 27–30 *supra*), so far as the rights of the general contractor are concerned, unless the picketing union can establish its majority status among the general contractor's employees, picketing aimed at forcing him to enter into any collective agreement *is* subject to the limitations Congress contemplated in enacting Sections 8(b)(7)(C) and 8(f) and where the picketing union, as in *Woelke & Romero*, is concededly the lawful representative under Section 9(a) of the Act, the union can properly claim the same rights as other unions to insist on lawful contract provisions.

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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JANUARY 1982

APPENDIX

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

Section 158(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

Section 158(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases

or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 158(f). It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, which is later, or (3) such agreement requires the employer to notify such labor organiza-

tion of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

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Nos. 80-1798, 80-1808 and 81-91

IN THE

Supreme Court of the United States

October term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

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IN THE

Supreme Court of the United States

October term, 1981

Nos. 80-1798, 80-1808 and 81-91

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

1. The Board ignores Congress' "major aim" of outlawing the broad top-down organizing caused by this signatory subcontractor clause. The extensive briefs and the Board's selective approach must not obscure the central issue: To determine the balance intended by Congress between (1) prohibiting secondary boycott

agreements that top-down organize, and (2) accommodating special construction industry needs; specifically, in striking that balance did Congress intend that the construction proviso legalize the broad top-down organizing of this signatory subcontractor clause which is applicable at all times to all jobs, simply because the union represents (or seeks to represent) one or more of the general contractor's employees on some job at some time?

The Board's[1] brief omits virtually half of that balance: It omits discussing Congress' "major aim" (*Connell*, 421 US at 632) of limiting top-down organizing. It omits the extensive legislative history of assuring uncoerced employee choice of representative. It omits Congress' purpose of assuring employer free choice in business dealings by strengthening secondary boycott prohibitions. It omits *Connell's* reasoning which condemns a nearly identical clause. It even omits from its statement of the case the basic requirement of Local 701's contract that all signatory subcontractors' employees join Local 701. It omits discussing the broad top-down organizing impact of this signatory subcontractor clause. Nor does the Board respond to our opening brief which examines these points. In short, the Board avoids examining the first half of the balance: Congress' basic purpose of limiting top-down organizing caused by secondary boycott agreements—which is flagrantly violated by this broad clause. The Board thereby avoids a meaningful examination of Congress' balance which is the issue in this case.

2. **The legislative history does not support, but is contrary to, the Board's new argument that the proviso's purpose is to secure job opportunities and continuity of fringes for all union members.** The Board's one-sided analysis seriously misstates—with a substantially new argument—the special construction industry needs which Congress intended to accommodate by the § 8(e) proviso. As shown in our opening brief (pp 27-35), the special construction industry characteristics recognized by Congress were (1) the short duration of jobs with the need to know labor costs in advance and to have a source of skilled workers (accommodated by § 8(f)), (2) the special threat to union wage standards posed by workers paid at substandard rates on the same jobsite, and (3) risks of jobsite friction between union and nonunion workers. But these characteristics cannot justify the broad top-down organizing of this

[1]The unions' arguments are essentially the same as the Board's. For simplicity, we will refer primarily to the Board and the Board's brief.

subcontractor clause since all of these concerns can be accommodated without need for the drastic restraint of excluding from the market every subcontractor whose employees have selected a different union or no union (*Ibid*). However, the Board now makes the new[2] argument that Congress' purpose when enacting the proviso was to secure "job opportunities" and "continuity" of fringe benefits for the entire "pool of union-represented employees" (Brd Br pp 24-25, n. 26).

The Board cites nine legislative statements as authority for this argument (Brd Br p 22, n. 23). None supports it. None even concerns secondary subcontractor clauses. Rather, they all concern proposals to legalize prehire agreements relating to contractors' own employees, not the employees of their subcontractors. They include *no* discussion of securing for union members "job opportunities" with subcontractors or of "continuity" of benefits. They include no approval (or even discussion) of agreements with general contractors that exclude from the market nonsignatory subcontractors—who may already have a full employee complement and have no need for a prehire agreement.

The Board-cited legislative statements are, in fact, contrary to the Board's position. They express legislative concern over even § 8(f)'s limited infringement on employee rights—namely, recognition of a union which may not represent the employees later hired[3]—and are thus contrary to the Board's argument that Congress intended to disregard employee rights by allowing broad top-down organizing clauses. The very record cited by the Board assures otherwise: Congress opposed legislation that "would

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[2]This argument differs from those below and in the Board's brief opposing *certiorari*. The Board's decision reasoned that the proviso's purpose is irrelevant when there is a "collective bargaining relationship" so did not even examine that purpose; the Board makes no such argument here. The court majority below reasoned that the proviso's purpose was to satisfy the need for "maintaining wage levels" and other economic benefits on construction jobs (654 F2d at 1316; J.A. 87), and so did the Board's brief opposing *certiorari* (p 8); the Board apparently no longer relies on that unsound argument. Nor does the Board now argue (as did the majority below, see 654 F2d at 1309, J.A. 72) that the prejob needs of knowing labor costs and having a source of skilled workers somehow justify this clause.

[3]E.g., Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 86th Cong., 1st Sess. on S. 505, S. 748, S. 76, S. 1002, S. 1137 and S. 1311, Bills pertaining to Labor-Management Reform, p. 137 (1959)(statement of Archibald Cox)(hereafter "Senate Hearings").

unreasonably interfere with the freedom of employees to choose their own bargaining representatives" and it was assured that the legislation adopted would not "open the door" to the practices "disclos[ed] before the McClellan committee related to employees ... who were forced into ... unions not of their own choosing."[4]

Furthermore, the legislative history cited by the Board emphasizes Congress' express "intent" that prehire agreements be "voluntary": a union may not "strike, picket or otherwise coerce an employer to sign a prehire agreement" (105 Cong. Rec. 18128 (1959); 2 Leg Hist 1715 (Senator Kennedy), quoted in *NLRB v. Iron Workers (Higdon Construction Co.)*, 434 US 335, 348, n. 10 (1978)). The legislative history cited by the Board is thus not only devoid of evidence of any purpose to secure "job opportunities" or "continuity" of fringe benefits but is directly contrary to the Board's argument that Congress intended to license broad top-down organizing through signatory subcontractor clauses and intended to sanction strikes to secure them.

Particularly revealing is the Board-cited statement of Richard J. Gray, then president of the AFL-CIO Building and Construction Trades Department.[5] Describing how the proposed legislation would function, Mr. Gray states that "the method chosen by S. 1555 [which later became § 8(f)] to accomplish the object of validating the prehire agreement in the building and construction industry ... strikes the most sensible balance between the economic needs of the industry and the preservation of freedom of choice by the employees" (*Id* at 1731). He explains that "balance" as follows: An employer can enter into a prehire agreement if he "wishes" but this will not infringe on the rights of employees (*Ibid*); "[o]f course" if an employer operates "on a nonunion basis" then "he will have no reason for entering into an agreement with any kind of union" (*Ibid*); and if an employer "wishes" to make a prehire agreement but does not in fact later employ union members, the agreement is no bar to an election so that the "choice of the employees" can later be

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[4]105 Cong. Rec. H14205 (daily ed. August 11, 1959), 2 Leg Hist 1578 (remarks of Reps. Thompson and Udall, incorporating speech by Speaker Rayburn in support of Section 702 of the House committee's bill, which later became § 8(f), and in opposition to the alternative proposal to allow Board certification without an election).

[5]Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H. R. 4474 and Related Bills Regarding Labor-Management Reform Legislation, p. 1727 (1959) (hereafter "House Hearings").

determined (*Ibid*). Nowhere does Mr. Gray suggest that the "balance" Congress struck was intended to give unions the right to *impose* prehire contracts or any other labor contracts on subcontractors through the device of a signatory subcontractor clause. Nor does any other statement in the entire legislative record assert such a purpose. Yet *that* is the Board's contention here.

3. **The Board's new argument has additional errors in that it misstates the practice of general contractors, fails to recognize that subcontractors' nonunion employees are forced into the union with their jobs, and misrepresents the law applicable to fringe benefits.** The Board's new argument is erroneous for additional reasons: First, the Board erroneously describes the "practice" of general contractors to be to elect on each job whether to perform the particular work themselves (with their own employees) or to subcontract it (Brd Br 2-3); the Board argues that Local 701 therefore needs this subcontractor clause to protect its members' jobs, which on any project may be either done by the general contractor or subcontracted (Brd Br 10, 23-24). The actual practice of general contractors is entirely different. Each general contractor regularly performs certain types of work with his own employees: he has the experience, equipment and managerial skills to perform it and does not subcontract it. Other types of work he has neither the equipment, experience nor skills to perform—or even to independently bid—and therefore he regularly lets it to subcontractors.[6] Although practices of different general contractors vary depending on their own expertise, each has a tradition of the limited work he does himself.

Furthermore, Local 701's labor contract (and the subcontractor clause) covers *all* kinds of heavy equipment operation even though the particular general contractor *always* subcontracts many kinds of such work.[7] The Board's argument that this clause is justified "'to preserve and protect the work opportunities normally available to

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[6]For example, a building contractor may traditionally perform with his own employees only the rough structural carpentry forming (and related laboring and ironwork) on concrete commercial structures, and subcontract virtually all other work: he may, for example, never employ any crane operators or concrete pump operators—always subcontracting such work to those having the needed costly equipment and experienced personnel.

[7]For example, it covers operation of concrete pumps and cranes and dozens of other operations (R 91, 92, etc.) which are always subcontracted by virtually every general contractor.

employees'" of the general contractor (Brd Br 4, 24)[8] is thus unsound. Local 701 cannot preserve for the general contractor's employees work which they have not performed. And the work which the particular contractor's employees *have* traditionally performed can be protected by a primary work preservation clause without need for this broad signatory subcontractor clause. *Woodwork Manufacturers Asso. v. NLRB*, 386 US 612 (1967); *Carrier Air Conditioning Co. v. NLRB*, supra. Nor can the Board support its contention that the proviso's purpose is to extend beyond such primary protections and protect the job opportunities of the entire "pool of union-represented employees" (Brd Br 24, n. 26), for (as shown above) there is no support in the legislative history for such an alleged purpose.[9]

Second, this subcontractor clause does not even have the effect of securing "job opportunities" for the "pool of union-represented employees" because it organizes subcontractors' nonunion employees and *adds them* to that pool. As illustrated by the very legislative testimony cited by the Board, the existing "pool of union-represented" employees is being "constantly employed" by the group of all of the employers with union labor agreements (*House Hearings*, 579). This clause forces employees of nonunion or wrong-union subcontractors into the "pool" and thus the number of workers in the pool is expanded with the number of jobs. Because the ratio of union workers to union jobs is not affected by this clause, it does nothing to improve any union worker's opportunity for obtaining work; instead, by forceably adding the subcontractors' employees (along with their jobs) to the pool, this clause operates simply to organize those employees from the top down.

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[8]The Board quotes the self-serving language of the *Woelke* clause. As observed by Chief Judge Oaks about a similar "purpose" clause, "One can only surmise that the ... language was window dressing, intended to impress ... a reviewing court" *Carrier Air Conditioning Co. v. NLRB*, 547 F2d 1178, 1185, n. 6 (2d Cir 1976), cert den 431 US 974.

[9]The only reference in all the Board's citations to a "pool" of union-represented employees is in the testimony of Frank J. Rooney (who was chairman of the national AGC labor committee, *House Hearings*, 573) and William E. Dunn (assistant executive director of the national AGC, *Id* at 574). But their statements do nothing to support the Board. They were discussing solely the need for *prehire* agreements by general contractors, not secondary subcontractor clauses. They suggested that the holdings that might outlaw prehire agreements in the construction industry were inapplicable to multi-employer groups whose member-employers, among them, employed all of the union's members in the "pool" so that considered as a group, their labor contract was not entered before employees were hired (*House Hearings*, 579, 586, 595-596).

Third, the Board's unsupported argument that subcontractor clauses are necessary to assure "continuity of pension, health care, and other fringe benefits" (Brd Br 25, n. 26) is baseless: The Board states that under § 302 of the LMRA "unless the subcontractor performing the construction work is signatory to the applicable union contract, it cannot contribute to the fringe benefit trust funds" (Brd Br 25, n. 26). This is false. Section 302 requires only that "the detailed basis on which [contributions] are to be made is specified in *a* written agreement with the employer" (29 USC § 186(c)(5)(B), emphasis added); it does not require the "written agreement" to be a labor contract, much less one that requires employees to join the union. Nothing in § 302 or elsewhere requires trust beneficiaries to be represented by or members of any union; on the contrary, such a requirement would be unlawful discrimination (see e.g.: *Rosen v. NLRB*, 455 F2d 615 (3rd Cir 1972)). Thus any employer, even if he has a contract with no union or the wrong union, can lawfully contribute to trust funds as long as he is *party to an agreement which specifies the basis for those contributions*. It follows that even if, as the Board erroneously asserts, the 1959 Congress had been concerned with "maintain[ing]" the "flow of contributions into the fund" (Brd Br 25, n. 26), this end can be achieved without forcing employees to join the union against their wishes, in direct contravention to a dominant purpose of the 1959 legislation.

Furthermore, the "continuity" of union members' benefits is based on their *own* work for contractors with union labor contracts, and is not affected by the fact that subcontractors' employees may not be covered by the same trusts. The union members' interest in *their* continuity of fringe benefits does nothing to justify a union power to force subcontractors to contribute to these trusts on behalf of the subcontractors' employees—who may prefer an alternative method of retirement security or medical care.

Nor does the Board (or unions) cite anything in the legislative history even suggesting that Congress perceived that union members' "continuity of fringes" somehow needed special protection in the construction industry or that the proviso to § 8(e) was intended to supply it.[10]

4. The Board's description of legislative history is a distorted narrow selection which misstates Congress' perception of the

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[10]The Board erroneously implies that trusts under § 302 of the LMRA are a unique characteristic of the construction industry. They are actually common in most industries.

status of the law and of the industry practice relating to this kind of top-down organizing clause, and avoids Congress' intent to outlaw such clauses. The imbalance of the Board's brief is particularly acute in its review of legislative history, which is only a narrow selection removed from context and makes no effort to "reconstitute the gamut of values current at the time" (*Woodwork Manufacturers Asso. v. NLRB*, 386 US 612, 620 (1967)). Most significantly, and as already noted, the Board omits discussing the pervading congressional purpose of limiting top-down organizing.

a. **The Board's unpersuasive authority.** Even the Board's few selections from the lengthy Congressional record are directly opposed to the Board's broad interpretation of the § 8(e) proviso: Senator Curtis' quoted statement (Brd Br 15) reflects his *opposition* to broad subcontractor clauses in the construction industry and his intention to prevent them. The members of the House Subcommittee who heard the quoted witness' statements about top-down organizing through a subcontractor clause (Brd Br 16-17) stated that in their "opinion . . . this is obviously an unfair labor practice and should be so ruled . . . but that if there is any question and the courts have any doubt about it, it is obviously the responsibility of the committee to write and correct the law so that there can be no such incident recur[;] [t]his is a manifest injustice" (*House Hearings*, 2368-9). Nor can these selections be used merely to show congressional awareness that some such clauses existed in 1959; the issue is what Congress intended to do about them, and even these selections show the clear intent to outlaw them. It is notable that the *only* citations the Board presents which discuss such clauses include explicit congressional disapproval and intent to outlaw them.

Except for the foregoing excerpts, the only legislative authority cited by the Board (or union) to support its position are the statements of Senator Kennedy and the Conference Committee discussed in our opening brief. We there show the many reasons why their reliance on these statements is misplaced (Ore AGC Br 38-47); neither the Board nor union has even responded to those points. We will not repeat them here. These "bare references" (*Connell*, 421 US at 629, n. 8), cannot reasonably be construed to intend to license broad top-down organizing simply because it is achieved by a subcontractor clause contained in a "collective bargaining relationship."

b. **The 1959 "pattern of bargaining."** The Board argues that subcontractor clauses like this were "part of the pattern of bargaining" throughout the industry in 1959 (Brd Br 15), but its only cited support is two articles. The first (Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 Monthly Lab. Rev. 14 (1950)) relates only to an area in Southern California, suggests that the practice there is unique (*Id* at 15), and describes that practice as restraints on "any subcontractor who attempts to depart from the established union standards" (*Id* at 17). The existence of a practice involving "union standards" in a portion of one state a decade before § 8(e) was enacted hardly shows that signatory clauses were a nationwide pattern of bargaining in 1959.[11] The second article (Lunden, *Subcontractor Clauses in Major Contracts*, 84 Monthly Lab. Rev. 579, 715 (1961)) was previously found "inconclusive" by the Board's General Counsel because it did not distinguish various kinds of subcontractor clauses (see our Op Br p 45). The General Counsel's own study found union signatory clauses of any form in only eight (fewer than twelve percent) of the contracts examined, and concluded: "... The only 'pattern' that does emerge is that of a mosaic, i.e., many different practices that vary with the union and the geographic area involved."[12] Lunden himself concluded "Few provisions were found [in the construction industry] that attempted to preserve job opportunities .... On the other hand, the protection of contract standards was of major interest" (Lunden, at 715)—a conclusion directly contrary to the Board's argument here. By no stretch can the Pierson and Lunden articles establish that subcontractor clauses going beyond maintaining union standards were a 1959 industry wide "pattern of bargaining" that would suffer "serious damage" (105 Cong. Rec. S16414 (daily ed. September 3, 1959), 2 Leg Hist 1432 (Senator Kennedy)) by the prohibition of

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[11]The Board falsely states the Pierson article "noted that similar bargaining arrangements also existed" in Portland, Oregon (Brd Br 15, n. 15); in fact the article says that the practice of standardizing "rates of pay and other basic work provisions for given job classifications" developed in Los Angeles and that in "certain other localities, notably Chicago, Portland (Oreg.), and Seattle, somewhat similar plans have been developed" (Pierson at 15). The article asserts only this rough similarity between the extent of standardization in Los Angeles and that in Portland; it makes no claim that any terms of any Portland contracts were similar to the terms of any Los Angeles contracts.

[12]93 Lab Rel Reporter at 394-395, 1976 Lab Rel Yearbook at 309.

certain types of signatory clauses (those unrelated to the prevention of jobsite friction).[13]

Equally infirm is the Board's contention that Congress at least *perceived* that union signatory subcontractor clauses were extensively used in 1959. The only evidence the Board cites on this question is testimony before a House Subcommittee that a single labor contract contained a signatory clause (Brd Br 16, citing *House Hearings*, at 2365) and a parenthetical phrase, unsupported by any citation to any evidence, contained in a lengthy written statement submitted by Senator Curtis to a Senate Subcommittee (Brd Br 15, quoting *Senate Hearings*, at 752). A subcommittee's awareness that of the thousands of construction labor agreements throughout the country, at least one contained a union signatory subcontractor clause, hardly supports the Board's claim; and the argument that Senator Curtis' isolated and unsubstantiated remark in a statement submitted to a subcommittee is proof of the state of mind of the entire Congress, is wholly unpersuasive.

c. **1959 law.** The Board argues that subcontractor clauses like this were lawful in 1959, citing only *Sand Door*[14] and *Northern California;*[15] but as shown in our opening brief (pp 41-43) neither those nor any other decision had clearly determined the lawfulness or enforceability or permissible scope of subcontractor clauses. In fact, *Sand Door* stated "There is no occasion to consider the invalidity of hot cargo provisions as such" (357 US at 107) and although it left the "possibility" (*National Woodwork*, supra, 386 US at 634) that such clauses were "lawful", the unmistakable implication of *Sand Door*, as observed by Senator Goldwater (*House Hearings* at 1647), is that such clauses were unenforceable (see our Op Br pp 42-43).[16] In *Northern California* the union's protest

[13]Furthermore, if the extent of 1959 signatory subcontractor clauses were relevant to this case (and it clearly is not), this would present a question of fact on which no findings were made by the Board (since neither *Connell* nor any other case decided at the time of the Board's decision herein ever stated that such an issue is relevant to the construction proviso) and which cannot be resolved by judicial notice. Rule 201(b) of the Federal Rules of Evidence. Accordingly, the only appropriate course would be to remand this case to the Board for resolution of that issue.

[14]*Local 1976, U. B. C. & J. (Sand Door)*, 357 US 93 (1958).

[15]*Northern California Chapter*, 119 NLRB 1026 (1957), enforced sub. nom. *Operating Engineers Local Union No. 3, Etc. v. NLRB*, 266 F2d 905 (DC Cir 1959), cert den 361 US 834 (1959).

[16]The statement in *National Woodwork* that § 8(e) was enacted in order to fill a "loophole" in § 8(b)(4) created by *Sand Door* (386 US at 634), is not to the

[*footnote continued next page*]

concerned union standards and there was friction when nonunion workers were "working alongside" union workers (119 NLRB 1026, 1030; see Ore AGC Br 41-42); and the Board ignores the fact that the Conference Committee statement on which it relies refers only to the present law "*under § 8(b)(4)*" (1 Leg Hist 943, emphasis added) whereas *Northern California* was decided under other provisions of the Act, not under § 8(b)(4), and is thus irrelevant to the Board's contention (see Ore AGC Br p 41).

The Board argues that Congress at least *perceived* subcontractor clauses like this to be lawful because "Congress" was "informed" that they were "lawful" and cites only a House Subcommittee hearing in which the *Northern California* decision was submitted (Brd Br 17, n. 16). But the Board omits the facts (stated in our Op Br pp 44-45) that at the very time the decision was submitted it was described to the subcommittee as a "decision by the court of appeals [that] makes it clear that the union and the employer had *violated* the unfair labor practice section of the Taft-Hartley Act" (*House Hearings*, 804, emphasis added), and that all subcommittee members who commented asserted not only that "this is obviously an unfair labor practice" but also that if "the courts have any doubt about it" then new legislation should make it clear so "there can be no such incident recur" (quoted above, *House Hearings*, 2368-9). Furthermore, the Board ignores the perceptions of Senator Goldwater (a member of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare and a conferee) that *Sand Door* "outlaw[s] hot cargo type of agreements" (*House Hearings*, at 1647), and of Representative Cramer that under existing law "hot-cargo contracts are unenforcible [sic]" (105 Cong. Rec. H14344 (daily ed. August 12, 1959), 2 Leg Hist 1620).[17]

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contrary. As noted in *National Woodwork*, *Sand Door* simply created a "possibility" (*Ibid*) that secondary clauses were lawful. This was a "loophole" since the existing ban on secondary activity possibly, though not necessarily, omitted such clauses. Section 8(e) eliminated the doubt on this question by expressly forbidding such clauses. (see 105 Cong. Rec. S3524 (daily ed. March 12, 1959); 2 Leg Hist 1007 (Senator McClellan)).

[17]Although Senator Kennedy said that some hot cargo agreements "appear to be legal today" (105 Cong. Rec. S16415 (daily ed. September 3, 1959), 2 Leg Hist 1433), this tentative statement reflects only Senator Kennedy's private views; the statement of the Conference Committee (which begins, "[t]o the extent that such agreements are legal today . . ." (1 Leg Hist 943)) carefully avoids taking any position on the current state of the law. As Senator Kennedy's other comments show, his focus was on union standards clauses and not signatory clauses used for top-down organizing (see part 5 infra).

The Board's claim that Congress viewed signatory subcontractor clauses as lawful simply cannot be reconciled with these directly contradictory statements by key legislators in both houses.

5. The "legitimate forms" of agreement Congress intended to preserve by the construction proviso were union standards clauses and did not include broad signatory subcontractor clauses used to top-down organize.

a. The Board seeks support from the House-passed Landrum-Griffin bill, which had no exceptions to § 8(e). The Board argues that legislative complaints that these broad "prohibitions 'would also outlaw legitimate forms of collective agreement'" led to the Conference's addition of the construction proviso, which Senator Kennedy stated was "'necessary to avoid serious damage to the pattern of collective bargaining'" (Brd Br 19-20). But as shown by the Board's own legislative citations, *the "legitimate forms" of agreement intended to be preserved were those maintaining union wage standards*. Thus, Senator Kennedy and Representative Thompson's joint statement complained that if no exceptions were added, agreements not to do business with *employers paying low wages* would be illegal (105 Cong. Rec. H15222 (daily ed. August 20, 1959), 2 Leg Hist 1708); they complained that the "House bill ... would also outlaw legitimate forms of collective agreement" since "[t]he House bill makes it unlawful for an employer ever to accede to a union's request that he cease doing business with another employer who is failing to maintain fair labor standards" (*Ibid*). They say nothing about broad signatory subcontractor clauses such as this being legitimate or that their top-down organizing should be allowed. Nor did anyone else. Senator Kennedy's position when the proviso was added is no different than he and others had previously expressed in opposing any hot cargo ban that applied outside the trucking industry; Kennedy said that "it is in the public interest for employers and unions to agree not to do business with employers who pay substandard wages and maintain substandard working conditions" (105 Cong. Rec. S5972 (daily ed. April 24, 1959), 2 Leg Hist 1195; see Ore AGC Br p 32).[18]

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[18]On that occasion Senator Kennedy also said:

"The effect of the amendment of the Senator from Arkansas would be to make it impossible for decent employers and employees to *protect their standards* in vital industries. *This is an economic issue*. It is a question of the

[*footnote continued next page*]

Similarly in the House the focus of concern was protecting construction wage standards; for example, Speaker Rayburn said:

> "Where all the men are employed on the same [construction] project . . . they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles . . ." (105 Cong. Rec. H14204 (daily ed. August 11, 1959), 2 Leg Hist 1577)[19]

It is in this context that the later statements of Senator Kennedy and of the Conference Committee become meaningful. The Senate conferees' insistence on adding the construction proviso was *not* an intent to license broad top-down organizing by subcontractor clauses. It was an insistence that construction jobsites be protected from disruption caused by substandard wages. And this was done by allowing agreements not to do business with employers paying subunion wages on the jobsite.

b. The Board argues that "any union" can have a union standards clause because they are *primary* and suggests that the proviso was intended to give construction unions a greater right (Brd Br 24, n. 26). But as we pointed out in our opening brief (pp 32-33 and n. 42), unanswered by the Board, until many years *after* 1959 union standards clauses were held by the Board itself to be secondary (e.g. *Meat and Highway Drivers, Etc., Local No. 710 (Wilson & Co.)*, 143 NLRB 1221 (1963), remanded in part 335 F2d 709 (DC Cir 1964)), so the proviso was required to assure that construction unions had the right to such clauses on construction sites.

Furthermore, the proviso allows union standards clauses which have a secondary reach: it allows union standards clauses that apply to all jobsite work covered by the union's contract, including work which is not unit work (i.e. work traditionally performed by the union's members employed by the general contractor); in contrast,

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right of unions, *so long as they do not strike or seek to put pressure on the employer,* to attempt to protect their standards . . . .

"This is not a question of racketeering. It is a question of legitimate activity to protect reasonable wages . . . ." (105 Cong. Rec. S5972 (daily ed. April 24, 1959), 2 Leg Hist 1195, emphasis added)

[19]See also 105 Cong. Rec. S16418 (daily ed. September 3, 1959), 2 Leg Hist 1436 (Senator Carroll), 105 Cong. Rec. H14215 (daily ed. August 11, 1959), 2 Leg Hist 1588 (Congressman Bolling on behalf of Congressman Elliott), 105 Cong. Rec. H14512 (daily ed. August 13, 1959), 2 Leg Hist 1684 (Congressman Goodall).

other unions can have only primary union standards clauses, which must be confined to unit work.[20] Congress considered the wages of other employers' employees on the same jobsite to have such a direct impact on all jobsite wages in that trade as to justify this exception (e.g. 105 Cong. Rec. H14204 (daily ed. August 11, 1959), 2 Leg Hist 1577 (Speaker Rayburn), supra).[21]

Finally, the proviso allows signatory clauses where their object is to avoid jobsite friction, whereas other unions have no such right. But such clauses must be confined to times and places where such friction is possible, namely to jobs when the union's members employed by the general contractor are present.

c. The terse comments of Senator Kennedy and the Conference Committee were certainly not intended to license all forms of subcontractor clauses even though they conflict with Congress' "major aim" of limiting top-down organizing, and serve none of the special needs of the construction industry which Senator Kennedy himself, and the others, described as their concern.

The Board's apparent hope is that this busy Court will be satisfied with a shallow inquiry, so that it will not delve beneath the Board's simplistic argument that "although Congress was urged to pass legislation banning secondary subcontracting agreements in the construction industry and the House passed a bill that would have had this effect, the Senate refused to agree and successfully insisted on a proviso designed 'to preserve the *status quo*'" (Brd Br 21). This argument disregards the pervading *purpose* of Congress—in both the House and Senate—to limit top-down organizing, and disregards the *purpose* of Congress when it recognized the special needs of the construction industry and struck a balance to accommodate those needs. As this Court made clear in *Connell* the scope of § 8(e) and its proviso is limited to Congress' *purpose* when enacting them (421 US at 628). The legislative record shows: (1) Congress' "major aim" throughout was to limit top-down

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[20]Even construction unions must confine off-site union standards clauses to unit work, e.g. *Local 282, Teamsters*, 197 NLRB 673, 677 (1972) (Held: applying a union conditions clause to offsite work "traditionally ... done ... by employees of the suppliers and subcontractors who are outside the work units" of the general contractors violates § 8(e)); *NLRB v. Local U. No. 141 of Sheet Metal Wkrs'. Int. Assn.*, 425 F2d 730 (6th Cir 1970).

[21]Although jobsite friction between union and nonunion workers can occur only when both union and nonunion workers are present, substandard wages paid to operating engineers affect Local 701's members on the job even though they are not working there at the time.

organizing. (2) Congress was also concerned with the need for prehire contracts in the construction industry and adopted § 8(f) to accommodate that need, permitting *voluntary* labor agreements even though the contractor does not yet employ a representative labor force. (3) Congress was also concerned about jobsite friction between union and nonunion workers, and about protecting union standards on construction sites, and adopted the construction proviso to § 8(e) to accommodate those needs.

6. **The "protections" against top-down organizing alleged by the Board give no protection.** The Board asserts that concern over top-down organizing "misconceives the operation of subcontracting clauses" and that various "protections" "assure that the Act's policies of employee free choice and majority rule would be given effect in a manner suited to the practical realities of the construction industry" (Brd Br 27, 30). This is nonsense. None of the Board's alleged "protections" in any way inhibits the coercion exerted by this clause. Nor do any "practical realities" justify it.

a. The Board argues that organizational picketing of the *subcontractors* is limited to 30 days by § 8(b)(7)(C) (Brd Br 28). But there is no need under the Board's rule to picket any of the subcontractors since the union can picket the *general* contractor to force agreement to the subcontractor clause which organizes *all* his subcontractors at once from the top down; indeed, that is what these cases are all about. *And under the ruling below picketing of the general contractor for that purpose is without any limitation from § 8(b)(7)(C) or any other provision.*

b. The Board argues that if the subcontractor does succumb to the boycott and signs a contract his employees could later secure a Board election (Brd Br 28). But if the subcontractor's employees do not vote for the union, they will lose their jobs throughout all AGC projects—a substantial portion of the market. *As the Board has repeatedly recognized, it is an elementary premise of the Act that employees must not be coerced in the selection of their representative by threat of job loss.* Such threats are "one of the most flagrant means" of violating employee rights and are "especially repugnant to the purposes of the Act" *General Stencils, Inc.*, 195 NLRB 1109, 1109-10 (1972).[22]

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[22] "The Board has long regarded the threat of job loss as having a seriously coercive effect on the employees' freedom of choice in the election of a collective bargaining representative" *Four Winds Industries, Inc.*, 228 NLRB 1124 (1977); and see *Cohen Bros. Fruit Co.*, 166 NLRB 88, 90 (1967).

c. The Board argues that the subcontractor might on a later project repudiate such a coerced agreement if a representative stable majority of his employees did not join the union, citing *Higdon*, supra, 434 US 335 (Brd Br 28-29). But the subcontractor is probably powerless to repudiate the contract[23] and, in any event, the same economic coercion that originally caused the agreement and caused the employees to acquiesce in it, continues to operate. *To avoid exclusion from the large share of the market consisting of all projects with AGC general contractors, the subcontractors and their employees must continue to be bound by the union agreement and its union security obligation.*

d. The Board argues that "nonunion employees are not frozen out of the job market" because under the union shop clause employees need not actually join the union but need only pay union initiation fees and dues[24] and it is unlawful for a union hiring hall to discriminate against those employees it represents who have not become members (Brd Br 29). Of course, these same legal principles governed when *Connell* was decided, yet the Court characterized that clause as "an almost unlimited organizational weapon" (421 US at 631). The reasons for this, carefully avoided by the Board, are clear. While an employee who works under a collective bargaining contract which, like Local 701's contract (J.A. II 15-16), contains a union security clause, need not become a member of the union, he must meet all the financial obligations of union membership and also *must accept the union as his exclusive bargaining representative*. It is the union's status as exclusive bargaining representative for each employee in the unit—not "membership" in the union—which is the most significant element of the union-employee relationship. An employee who is deprived of free voice in the selection of his representative through the coercion of a boycott clause like that here loses his statutory right to select another union or no union at all; is faced with substantial

[23]The employer's "right" to repudiate a prehire contract is strictly limited, at best. The Board acknowledges that this right exists only for employers who do not have stable work forces and only on jobs where the union at no time represented a majority of the employees (Brd Br 28-29). However, according to two circuit courts even under those circumstances, an employer who repudiates a prehire contract remains liable for all the fringe benefit payments provided for in that contract for all covered work performed throughout the contract's full term, *Contractors, Etc. v. Associated Wrecking Co.*, 638 F2d 1128, 1134 (8th Cir 1981); *New Mexico Dist. Council, Etc. v. Mayhew Co.*, 664 F2d 215, 220 (10th Cir 1981). Under these authorities the employer's "right" of repudiation is illusory indeed.

[24]The current initiation fee of Local 701 is $1,000. Its dues are $96 per quarter.

barriers to replacing his representative; and is bound by the acts of the representative forced upon him in vital matters such as strike decisions, negotiation of all wages and benefits, and decisions whether to process the employee's grievance. Any employee of a subcontractor who is unwilling to give up his statutory right of free choice and to accept the specific union—here, Local 701—as his exclusive representative on these vital matters, will be discharged and ineligible for employment on any job within Local 701's monopoly. Thus here, as in *Connell*, the boycott subcontractor clause intrudes deeply upon employees' § 7 rights and operates as a massive top-down organizing device.

e. The Board argues that employees of nonunion subcontractors with whom the union has a primary dispute "are protected against secondary picketing designed to force them off their current job" since Congress did not overrule *Denver* (Brd Br 29). But by the Board's rule they are *not* protected from picketing of *all* the general contractors' jobs to force each general contractor to agree to exclude them from all future jobs if they do not agree to Local 701's representation.

f. The Board argues that the union cannot picket to enforce the subcontractor clause (Brd Br 29). But under the Board's rule the union can picket to *secure* the clause and then enforce the clause in court, forcing the general contractor to pay twice for subcontracted labor if he uses disfavored subcontractors.

7. **The Board's effort to reconcile its ruling with *Connell* is seriously flawed.** The Board had refused to issue a complaint in that case, and now seeks to narrow *Connell* into oblivion.

The Board disregards *Connell's* reasoning which, as shown in our opening brief (pp 15-18), limited the proviso to its purpose and held it inapplicable to a subcontractor clause identical to this in a context where the union's members were never employed by the general contractor. The Board does not even try to explain how the Board's rule— that the mere presence of one union member employed by the general contractor at some time on some job legalizes top-down organizing at all times on all jobs—can be squared with *Connell's* reasoning.[25]

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[25] It is noted that a decision by this Court that this union signatory clause violates § 8(e) does not subject the parties to antitrust damages in the absence of a purpose of forcing other employers out of business. *Commerce Tankers v. Nat. Maritime U. of America*, 553 F2d 793, 801-802 (2d Cir 1977), cert den 434 US 923 (1977); *United Mine Workers v. Pennington*, 381 US 657, 672-673 (1965); *Consol. Exp., Inc. v. N.Y. Shipping Ass'n.*, 602 F2d 494, 519-521 (3rd Cir 1979), vacated on other grounds, 447 US 490 (1980).

Rather, the Board argues that the *Connell* clause was "novel" and that *Connell* is merely a patch on a leak in § 8(b)(7)(C). The claim that *Connell's* clause was "novel" is unsupported in the record and is contrary to the Board's General Counsel's prior statement that such clauses were "commonplace" in 1959 (see our Op Br pp 40-41). More importantly, *Connell* did not rule on the ground of "novelty"; it examined the purpose of the proviso and found that purpose inapplicable. That purpose is also inapplicable to this clause (*Id* at 36).

The Board argues that the union in *Connell* avoided the prohibition of § 8(b)(7) against recognitional picketing by disavowing any recognitional objective; it was solely for that reason (the argument continues) that this Court was forced to find another section of the Act to prohibit the picketing of Connell and accordingly held that the clause violates § 8(e) (and therefore picketing for the clause would violate § 8(b)(4)(A)). On the other hand (the Board argues), whenever a union puts its subcontractor clause in a full blown labor contract and pickets a contractor with the demand that he recognize the union and sign the contract (subcontractor clause and all) then § 8(b)(7) applies and there is no need to find a § 8(e) violation (Brd Br 32-34). This description is entirely foreign to *Connell*. Nowhere does *Connell* even refer to 8(b)(7) except as a part of Congress' effort "to *limit* 'top-down' organizing" (421 US at 632, emphasis added). This cannot be distorted, as the Board does, into an intent to *permit* top-down organizing whenever § 8(b)(7) applies.

But even more significantly, the Board's argument is that *Connell* merely "assured" that picketing for subcontractor clauses be limited by *some* rule—unions with "collective bargaining relationships" being subject to § 8(b)(7) and "stranger" unions subject (by *Connell*) to § 8(b)(4)(A) (Brd Br 34). This is utterly wrong. As we elsewhere show (Ore AGC Br pp 47-48), and as the Board concedes, Local 701's picketing of these AGC contractors to secure this subcontractor clause "is not subject to the restrictions of Section 8(b)(7)" (Brd Br 34, n. 37). *Under the Board's rule Local 701 could lawfully picket indefinitely to secure this subcontractor clause.*

The Board argues that these AGC contractors "'may resist any attempts to secure a subcontractor agreement by asserting [their] own bargaining position and presenting [their] own demands'" (Brd Br 33, n. 34, quoting the majority below, and see p 34-35, n. 37).

Clearly this broad subcontractor clause cannot be justified by the theoretical notion that the employers could have taken a strong bargaining position on it, resisted a picket, and refused to agree to it. If Congress had accepted this justification, then it would have been unnecessary to outlaw such clauses in any industry. Furthermore, it would leave the protection of employee rights entirely to employers (who do not even employ the affected employees), which is wholly inconsistent with the basic design of the Act.[26]

Rather than even discuss *Connell's* reasoning, the Board extracts two or three phrases, presumes they mean that secondary subcontractor clauses are lawful whenever there is a "collective bargaining relationship" and argues that a particular phrase in *Connell* should be read in the disjunctive rather than conjunctive to achieve that conclusion (Brd Br 35). Gramatically either reading is possible. But such arguments are not productive. This Court resolved the issue in *Connell* by examining the relevant policies and will do so here. Those same policies render this clause outside the protection of the proviso.[27]

8. The Congressional purpose must not be frustrated by literalism. The unions' lengthy argument for a literal reading of § 8(e) and its proviso (U Br 7-9) warrants only a short final

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[26]Here, for example, there are fundamental ways in which the interests of general contractors are inconsistent with subcontractors' employees' right of free choice. While general contractors desire the flexibility of dealing with all subcontractors, many general contractors are unwilling to take a strike to gain this flexibility for several reasons: (1) the alternative to a signatory clause would likely be a standards clause, which would remove any incentive based on lower labor rates; (2) even with a signatory subcontractor clause all general contractors having labor contracts with Local 701 suffer the same restraints and resulting competitive disadvantage among themselves; and (3) in contrast, the union's demand for a signatory clause is likely to be firm since the signatory clause does the union's organizing and enlarges its membership and its coffers.

[27]The Board notes that Connell uniformly subcontracted the mechanical work covered by the Local 100 contract (Brd Br 31). But many general contractors in AGC uniformly subcontract many kinds of operating engineer work (such as crane operation and concrete pump operation) covered by Local 701's contract. With respect to all such work they are no different than Connell. By the Board's logic Local 701 could top-down organize plumbers as well as crane operators by simply including the plumbers classification in its contract. The scope of the union's right to top-down organize cannot reasonably depend on the breadth of coverage of the union's contract, and become legalized by the employer's employing one of the union's members on a job somewhere. But the Board effort to limit *Connell* to its precise facts brings that absurd result.

comment. "This Court had no difficulty in rejecting [an] overliteral interpretation of [§ 8(e) of] the Act" in *National Woodwork* (Justice Brennan in *NLRB v. Pipefitters (Plumbers, Local 638)*, 429 US 507 at 534 (1977)). This Court in *Connell* again rejected literalism and required a subcontractor clause to be "'within [the proviso's] spirit, ... within the intention of its makers'" (421 US at 628). The Board itself has cautioned when interpreting § 8(e) that it must be given a "reading [which] gives hospitable scope to the competing interests which Congress here sought to balance" and care must be taken not "to pay observance to slavish literalism and to frustrate the congressional objective" *Construction, Production, Etc., Local 383 (Colson and Stevens)*, 137 NLRB 1650, 1652, n. 7 (1962), rev'd in part 323 F2d 422 (9th Cir 1963).

The deeper the search into the legislative history the clearer it is that the objective of Congress was not to allow the top-down organizing caused by this broad signatory subcontractor clause. Nor did Congress intend to allow it simply because the clause was sought or secured in a "collective bargaining relationship"—that is, where the union puts the clause in a full labor contract and the general contractor may employ a union member some time on some job. Construction unions can obtain all the protection which Congress intended for them through jobsite union standards clauses, and through signatory clauses confined by the jobsite friction rule to be operative only at the particular jobsite when the union's members employed by the general contractor are present. To allow such unions to exceed these limits advances no congressional purpose and defies a "major aim" of the Act.

CONCLUSION

For the above reasons the relief requested in our opening brief should be granted.

Respectfully submitted,
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Nos. 80-1798, 80-1808 and 81-91

In the Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondent.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.'s REPLY BRIEF

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v.

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ET AL., Respondent

PACIFIC NORTHWEST CHAPTER OF THE
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NATIONAL LABOR RELATIONS BOARD, Respondent

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NATIONAL LABOR RELATIONS BOARD, Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.'S REPLY BRIEF

SUMMARY OF ARGUMENT

A cascade of arguments and words leap forth from respondents' briefs. There is temptation to respond with a similar effusion. The temptation must and will be withstood. Now is the time to distill and synthesize; to look to governing principles; and not to wander in the morass of minutia.

Preliminary respondents' briefs are remarkably silent with respect to the normative judgment which must be made in this case. Not a single word is spent defending the effect of the Ninth Circuit's decision upon the rights of the public, nonunion employees, or the nonunion employer. The injury to three segments of society, no matter how grievous, is quickly swept from sight.

This Court must consider the issues in the framework of their impact upon each

segment of society. Destruction of Section 7 rights of employees cannot be ignored; emasculation of Section 9 electoral rights must be considered; the economic dilemma of nonunion contractor is patent; and the effect that swollen bids, bereft of natural competition, upon the consumer should be considered paramount.[1]

Distilled to its essence, respondents' arguments are as follows:

1. The plain language of the statute interdicts petitioner's interpretation;

2. The legislative history mandates the conclusion sought by respondents; and

3. That Connell divined a host of purposes for enactment of 8(e), each of which require affirmance of the judgment below.

None survive scrutiny.

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[1]See Brief for the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., pp. 12-22.

ARGUMENT

A.

Language of the Statute

Respondents urge that the plain language of the statute requires the conclusion that subcontracting restraints are permitted under the proviso to 8(e). The argument, while straight forward, misses the mark.

In Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) this Court held that some agreements in the construction industry which limited subcontracting to signatory subcontractors violate 8(e). Thus, unless the Connell decision were reversed, the issue is which agreements violate 8(e), not whether some do. The problem, then, is one of line drawing. In such circumstances a weighing process, comparing the intrinsic merits and impli-

cations of each party's position must be invoked.

B.

The Legislative History

The parties have written more words about what the legislative history proves than the total quantum of legislative history entails. The National Labor Relations Board, quite naturally, does not pause in its recitation of its interpretation of the legislative history to admit that it made these self same arguments as amicus curiae in the Connell case. These arguments were then dispatched, as they should now be, by the Court as "bare references" and in consequence constitute an insubstantial base upon which to predicate decision.

As all concede, the proviso to 8(e) was an after thought. It did not emerge, after debate, from the traditional committee give and take. To the contrary, it

emerged, full grown, from the Conference Committee with only a sprinkling of purpose attributed to it.

Senator Kennedy's remarks can justifiably be interpreted to intend that only work standards or work preservation subcontracting restraints remain unscathed by enactment of 8(e). Whether his understanding coincided with the collective body politic is unknown. In consequence, the only reliable bellweather to consider, in light of logic and context, is the probable objectives which may be attributed to Congress.

C.

The Congressional Purpose

All concede that an overriding concern of Congress in 1959 was to put a leash on runaway, top-down organizing. Picket and other activities in pursuit of such objective destroyed the centerpiece of the National Labor Relations Act,

Section 7 rights. The National Labor Relations Board now proclaims, however, it was the intent of 8(e) to exclude non-union employees from the benefits of Section 7. Absent a clear and unmistakable statement of such purpose, it ought not to be attributed to Congress.

Second, with respect to 8(e), all concede that it was the generalized intention of Congress to prevent voluntary agreements between employers and unions which would have the same impact as overtly coercive techniques, such as picketing. In some respect, as yet undefined, Congress intended different treatment to be accorded to construction workers. Logic compels the conclusion that the difference in protection afforded can be no less generous than the differences between the construction industry and other industries require.

All parties have identified and agreed upon one difference. Construction projects do require the thrusting together of employees of different employers at transitory locations and times. Indeed Congress may have hypothesized that friction would result from shoulder-to-shoulder contact between union and nonunion employees of the same craft. To satisfy this difference, the proviso need merely be read to apply when union and nonunion employees are working on the same jobsite at precisely the same times. When they work on different days or different shifts, jobsite friction is not possible. Any subcontracting restraint, such as the one present in this case, which extends beyond this narrow purpose, is overly broad.

Respondents urge a second congressional purpose. They urge that the provision was written in order to pre-

serve jobs and collectively pooled fringe benefit programs. They have mixed their metaphors.

In National Woodwork Manufacturers Association v. NLRB, 87 S. Ct. 1250, 386 U.S. 612 (1967), this Court held that 8(e) would not be violated unless a secondary purpose were shown to exist. The Board in this case held and the Ninth Circuit confirmed that the breadth of the subcontracting clause here clearly reflected a secondary purpose. It was not confined to work preservation but rather encompassed the union and its members generally. Having conceded the presence of a secondary purpose due to the breadth of the provision here, it seeks to justify the union's actions because they are motivated by a primary purpose, i.e., work preservation.

Work preservation or standards provisions, obviously primary in purpose, are

easily written. They were not uncommon in 1959. Had the union sought to negotiate such a provision with AGC, no complaint would be before this Court.

It has been commonplace for this Court to analyze market restraints in terms of whether a legitimate objective could be achieved through less restrictive means. This is the litmus test for rule of reason antitrust scrutiny. Siegel v. Chicken Delight, Inc., 448 F. 2d. 43, 51 (9th Cir. 1971), cert. den. 405 U.S. 955 (1972); Copper Liquor, Inc. v. Adolph Coors Co., 506 F. 2d. 934, 942-43 (1975). It has also been invoked as part of a balancing test in weighing First and Fourteenth Amendment rights against Section 7 requirements of the National Labor Relations Act. Hudgens v. NLRB, 424 U.S. 507 (1976). The same balancing process should be applied here.

It must be apparent that if Congress intended the 8(e) proviso to satisfy dual objectives, i.e., avoidance of jobsite friction and maintenance of standards, such a purpose could be satisfied by a less restrictive area standards subcontracting clause, coupled with a prohibition upon subcontracting to nonsignatory contractors at jobsites when employees of signatory contractors performing jurisdictionally similar work are contemporaneously present. To permit any broader restraint than necessary to satisfy these limited objectives, tramples upon Section 7 rights of employees.

CONCLUSION

Petitioner respectfully requests the Court to reverse the Court of Appeals decision and to remand to the National Labor Relations Board with instruction to

enter an Order declaring the signatory subcontracting provisions herein to violate Section 8(e) of the National Labor Relations Act.

Respectfully submitted,

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Nos. 80-1798, 80-1808, and 81-91

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October Term, 1981

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vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

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Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798).

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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

October Term, 1981

WOELKE & ROMERO FRAMING, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF OF PETITIONER, WOELKE & ROMERO FRAMING, INC. (NO. 80-1798).

I.
INTRODUCTION.

Respondents assert that the construction industry proviso to Section 8(e) of the Act, 29 U.S.C. § 158(e), was enacted

by Congress "principally" to preserve a pre-existing pattern of construction industry collective-bargaining. (Board's Brief, p. 10; Unions' Brief, pp. 10-11) Petitioner, on the other hand, has suggested that the reason for the proviso's enactment was limited to the alleviation of common-situs frictions on construction jobsites where union and non-union workers work side-by-side. (Petitioner's Brief, pp. 30-34) Which view is correct appears to be pivotal to the outcome of this case.[1]

Additionally, Respondents argue (1) that the issue of a construction union's right to picket to secure a secondary boycott agreement is not properly before the Court, and (2) that, in any event, Section 8(b)(4)(A) of the Act does not restrict such picketing. (Board's Brief, pp. 36-43; Unions' Brief, pp. 36-40)

We show below (1) that Congress did not enact the proviso for the reasons advanced by Respondents, (2) that Respondents are mistaken in contending that the Section 8(b)(4)(A) issue is not properly before the Court, and (3) that Section 8(b)(4)(A) does proscribe union picketing to secure Subcontractor Clauses, even if protected by the proviso.

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[1]The Board acknowledges that if Congress enacted the Section 8(e) construction industry proviso to alleviate *Denver Building Trades* common-situs frictions between union and non-union workers, the Subcontractor Clauses at issue in this case are outside that purpose and outside the protective shelter of the proviso. (Board's Brief, p. 14)

II.
ARGUMENT.

A. This Court Previously Has Dismissed the Notion That the Construction Industry Proviso to Section 8(e) Was Enacted to Preserve the Pattern of Collective Bargaining in That Industry.

In *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100*, 421 U.S. 616 (1975), this Court carefully examined the legislative history behind the proviso's enactment. *Id.*, at 628-630. Although this Court noted that the proviso was "explained" by a reference to a "pattern" of construction industry bargaining, *Id.*, at 628, the Court also noted that such a reference was a "bare" one. *Id.* Discounting the legislative history remarks by Senator Kennedy and Representative Thompson, *see*, 105 Cong. Rec. 17899, 18134, II Leg. Hist. of LMRDA, 1432, 1721, the Court remarked that the proviso to Section 8(e) was part of the legislative proposal to overrule *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), and stated: "[I]t [the proviso] seems, however, to have been adopted as a partial substitute for an attempt to overrule . . ." that latter decision. *Id.*, at 629.

Other references in the *Connell* opinion support the notion that the proviso was intertwined with and solely related to the proposal to overrule *Denver Building Trades*. Thus, this Court noted that the Section 8(e) construction proviso emerged from the Conference Committee as the only provision left of the parliamentary attempt to overrule *Denver Building Trades*:

> "The Conference Committee proposed to include . . . an amendment to § 8(b)(4)(B) in the Conference agreement, along with a closely linked construction-industry exemption from § 8(e). 105 Cong. Rec. 17333 (1959) (proposed Senate resolution), 2 Leg. Hist. of

> LMRDA 1383. But a parliamentary obstacle killed the § 8(b)(4)(B) amendment, and only the § 8(e) proviso survived. (references omitted)" *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, 629, n.8.[2]

Hence, what came to be known as the construction industry proviso to Section 8(e) went into the Conference Committee *only* because it was intertwined with resolution of the *Denver Building Trades* common-situs problem, and emerged in its present form *only* because the Conference Committee apparently compromised and granted some form of *Denver Building Trades* relief.

Respondents' argument that the proviso was enacted "principally" to "preserve" a pattern of bargaining is, thus, unsupported by the *Connell* opinion and is not aided by any Conference Report reference to that effect. It is logically unsupportable in light of this Court's previous articulations in *Connell* of the reason for the proviso's enactment.[3]

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[2]With respect to the 8(e) proviso the analyses accompanying the proposed Senate resolution stated:

> "4. The proviso also excerpts from the hot cargo clause and section 8(b)(4) agreements relating to contractors on the same construction project. This change in the present law, which corrects an inequity against labor, was recommended by President Eisenhower."

It is, hence, beyond question that the 8(e) proviso was intertwined with and, thus, part of the attempt to overrule the *Denver Building Trades* rationale.

[3]The *Connell* opinion also surmises that Congress, ". . . may have intended the § 8(e) proviso simply to preserve the status quo under *Carpenters v. NLRB (Sand Door)*, 357 U.S. 93 (1958), pending action on the *Denver Building Trades* problem in the following session. . . ." *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*. Again, however, the *Connell* opinion links the proviso to *Denver Building Trades* and ". . . common-situs relationships on particular jobsites. . . ." *Id.*, at 633.

B. The Board's Assertion That the Proviso Had More Than One Purpose Is Contrary to Prior Board Holdings.

The Board's argument that the proviso had *three* purposes, *i.e.*, (1) to partially overrule *Denver Building Trades*, (2) to preserve the pattern of collective-bargaining in the construction industry, and (3) to maintain union contract standards and employee benefit continuity (Board's Brief, pp. 10-11),[4] finds no support in the legislative history accompanying the proviso enactment. As shown above, the proviso had only *one* purpose.

Moreover, the Board's Counsel's argument is contrary to the Board's *own* previous statements as to the proviso's limited purpose:

> "As was observed, upon a review of the legislative history, in *International Union of Operating Engineers, Local Union No. 12 (Acco Construction Equipment, Inc.)*, the 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *Int'l Union of Operating Engineers, Local 542, etc. (York County Bridge, Inc.)*, 216 NLRB 408, 409 (1975).

With adroit prestidigitation, the Board's counsel carefully fails to note that the previous explanation of the proviso's purpose is at odds with the argument it now advances in this Court. If, as the Board now says, the proviso was enacted to preserve the pattern of collective bargaining in

---

[4]The Board, in reaching the decision in this matter now before the Court, did not rely upon this reasoning or argument now advanced by Board counsel (see Pet. App. C). Rather, the Board simply concluded that the *Connell* opinion merely required the existence of a bargaining relationship to privilege a Subcontractor Clause under the proviso. The Board did not attempt to demonstrate why the proviso should privilege clauses in the construction industry. Board counsel's rationalization *post hoc* shuld not be substituted for the Board's own views. Such a *post hoc* rationale appears inappropriate. *NLRB v. Yeshiva University*, 444 U.S. 672, n. 22 (1980); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

the construction industry, then presumably all forms of hot-goods, secondary subcontracting restrictions (on-site and off-site), and other picketing and boycott clauses that existed as part of that "pattern" should also have been preserved. See, Lunden, *Subcontracting Clauses in Major Contracts — Part II*, 84 Monthly Labor Review 715 (1961). But, Congress did not "preserve" all such cease-doing-business clauses. Only those provisions which were related to common-situs interests on particular construction sites where union and non-union workers were, or were to be, employed were "preserved" as Congress limited the proviso's application only to a "jobsite."

In short, the Board's ingenious argument is designed to demonstrate that construction unions should be permitted to seek, secure, agree to, enforce, and picket to obtain broad Subcontractor Clauses not limited to particular common-situs jobsite relationships in order to advance and preserve construction union boycotts, or techniques for organizing the unorganized. However, Congress limited the proviso to the single situation involving the "close relationship" between contractors at a single jobsite, *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, at 629-30, rather than grant a license to construction unions to use the proviso's shelter for other purposes.

As Petitioner demonstrated in its opening brief, the Subcontractor Clauses here are broad organizational tools, not limited to common-situs relationships on particular jobsites. (Pet. Brief, p. 36) The Clauses can not be "legalized" by Board arguments that Congress wished to protect construction union member work opportunities. However laudatory the preservation of union work opportunities or the continuity of general union benefits may be, such goals are not ones directly related to the interests served by the proviso. Broad "top-down" organizational weapons such as those

here can not be countenanced by the 8(e) proviso simply because construction unions have general internal policies or programs which might be affected. A contrary view would attribute to Congress an intent not clearly expressed anywhere in the 1959 legislative history, and contrary to this Court's previous statements. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra.*

C. Contrary to Respondents' Assertions, the Issue of a Union's Right to Picket to Obtain a Subcontractor Clause Is Properly Before This Court.

Respondents assert that whether it is lawful to strike for an agreement whose legality is otherwise preserved by the construction industry proviso is not properly presented because Petitioner did not raise it before the Board as Respondents assert is required by Section 10(e) of the Act, 29 U.S.C. § 160(e). (Board's Br., p. 36, n.30; Unions' Br., pp. 36-37) Respondents are mistaken.

The issue was raised during the consolidated oral argument before the Board prior to the Board's decision in this case. The Board recited the rule challenged here in its decision in this case and applied its rule that a union may strike to obtain an otherwise proviso-protected agreement in the decision under review. Petitioner specifically raised the issue at the first appropriate time — the Court of Appeals — after the Board had made findings and conclusions and after the Board had applied the rule to Petitioner's case. Neither the Board nor the Unions protested to the Court of Appeals that the issue was not properly raised there, either to the three-judge panel of the Court or to the *en banc* Court. Petitioner preserved the question for review in this Court by delineating it as a "Question Presented" in its Petition for Writ of Certiorari, and this Court did not limit the grant

of the Petition despite the Board's and the Unions' having opposed the grant of certiorari on this point.

The alleged bar of Section 10(e) of the Act, 29 U.S.C. § 160(e), simply has no applicability here. Petitioner, the Board's General Counsel, and the Unions presented this case to the Board for decision upon a stipulated factual record. The parties requested that the *Board*, not an Administrative Law Judge, make findings of fact and conclusions of law. Not until the Board issued its decision in this case was there any adverse finding, conclusion or remedial order to which to "object" within the meaning of Section 10(e). *Cf., Kallmann v. NLRB*, 640 F.2d 1094, 1101 n.14 (9th Cir. 1981); *AMCAR Division, ACF Industries, Inc. v. NLRB*, 596 F.2d 1344, 1350 n.8 (8th Cir. 1979).

Respondents' reliance upon cases such as *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1970); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961), and *ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975), for the proposition that the issue is not properly before this Court, is in error. Those cases stand for the proposition that a finding or order must be objected to at the first available opportunity in order to be ripe for consideration by a reviewing court. The purpose of the Section 10(e) bar is to allow the Board the opportunity to consider an objection before a reviewing court does so. The cited cases are premised on "objections" or "exceptions" to Board action, and require a litigant to object after the Board, or one of its Judges, issues a ruling, finding or conclusion. Those decisions simply are not applicable to the situation here where the Board itself was the initial fact finder. Additionally, here, the Board noted its rule in its decision (Pet. App. C., pp. 90-91), and in holding the Unions' picketing did not violate the Act, applied that rule in this case. (Pet. App. C., p. 98). The Board had the opportunity to consider the issue and did so.

Indeed, when the instant case was pending before the Board, oral argument was heard in this and consolidated proceedings. The oral argument included counsel for the parties in all proceedings as well as counsel for various *amici curiae*. During oral argument, the matter of a union's right to picket to obtain Subcontractor Clauses was addressed by at least one counsel. The Board, in its decision in the instant case, noted that in making its findings and conclusions it had considered the entire record including those oral arguments made to the Board. (Pet. App. C., p. 73)

When the Board did make its findings and conclusions, Petitioner sought review thereof in the appropriate forum — the Court of Appeals. Not once, but twice was this case heard by the Court of Appeals: a three-judge panel of the Court acknowledged that Petitioner had raised the issue, but found it unnecessary to reach it (Pet. App. B., p. 69). The *en banc* Court of Appeals did reach the issue (Pet. App. A., pp. 40-41).

In sum, the question presented for review in this Court was addressed by the Board, was "objected" to at the first opportunity to do so, was considered and resolved by the Court below, and was presented to this Court in the Petition for Writ of Certiorari. Petitioner suggests that it is properly before this Court.

D. The Section 8(e) Proviso Sanctions Only Voluntary Agreements and Coercion to Exact Such Agreements Was Intended to Be Precluded by Section 8(b)(4)(A).

As Petitioner asserted in its Opening Brief (Pet. Br. pp. 43-49), construction unions were not given an exemption from the proscriptions of Section 8(b)(4) so as to secure Subcontractor Clauses. Rather, the intent of Congress was

to grant construction employers and their unions a limited right to *voluntarily* agree to the boycott inherent in a common-situs related clause. II Leg. Hist. of LMRDA, 1715 (Remarks of Representative Barden).

Respondents assert that Congress intended to preserve the law existing prior to 1959 and, thus, to preserve a union's right to picket to obtain a Subcontractor Clause.

Whatever may be said of the state of the pre-1959 law, the legislative history accompanying the 1959 amendments to the Act provides little support for Respondents. What references do exist reveal a Congressional desire to limit, not permit, construction union picketing with reference to common-situs interests, which as noted earlier, are the only ones protected by the proviso.

For example, Congress spelled out that the so-called *Sand Door* rule, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), remained applicable after the 1959 amendments so as to prevent picketing to enforce even proviso-protected agreements. H.R. No. 1147 on S. 1555, I Leg. Hist. of LMRDA, 943. And, the Congress did not pass legislative relief for construction union picketing at common-situs projects, leaving intact prior law restraining a union from engaging in picketing with a "cease doing business" objective at such projects. *Id.* Congress even limited a construction union's ability to picket for a "prehire" agreement, declaring that no coercion could be used to exact such an agreement from an unwilling employer. H.R. No. 1147 on S. 1555, I Leg. Hist. of LMRDA, 946. Construction unions were not given an exemption from Section 8(b)(4) as were garment industry unions, and Congress did not exempt construction unions from the newly-enacted Section 8(b)(7) restrictions on organizational picketing. *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra*, at 630, 632.

Absent a *clear* indication that Congress desired to open a glaring loophole in Section 8(b)(4) the Act at the very time it was enacting legislation to close other loopholes in that same section, this Court should not read Section 8(b)(4)(A) as literally as Respondents suggest it be read. *Cf., Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union 100, supra.*

III.
CONCLUSION.

The proviso's authorization extends only to those agreements which are *both* (1) contained in the context of a collective bargaining relationship, and (2) limited to common-situs relationships on particular jobsites where union and non-union workmen are employed together. This narrow protection for such agreements is not applicable to the Subcontractor Clauses before this Court because although Petitioner had a collective bargaining relationship with the Unions, these Clauses are broader than the proviso's shelter. The Clauses are "top-down" organizing provisions, not limited to particular jobsites, which force contractors such as Petitioner to assist the union in organizing its subcontractor's employees rather than protecting the union members in Petitioner's employ from having to work alongside non-union workers.

The provisions themselves, and the Unions' attempt to obtain them by picketing, should be declared unlawful by this Court.

Newport Beach, Calif.

Dated: February 23, 1982.

Respectfully submitted,

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OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF AIR CONDITIONING & REFRIGERATION INSTITUTE, AIR MOVEMENT AND CONTROL ASSOCIATION, AMERICAN CONSULTING ENGINEERS COUNCIL, ARCHITECTURAL WOODWORK INSTITUTE, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

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This brief amicus curiae on behalf of the above-named organizations is submitted with the consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

The associations joining herein have a substantial and longstanding interest in the effective implementation of the statutory prohibitions against secondary boycotts, particularly in the construction industry. Members of the American Consulting Engineers Council (ACEC) and the National Society of Professional Engineers (NSPE) design, specify and provide engineering services on all types of construction projects and therefore have a major role in determining the materials, components and methods to be used in construction. Members of the Air Movement and Control Association (AMCA), the Air Conditioning & Refrigeration Institute (ARI), the Architectural Woodwork Institute (AWI), and the National Woodwork Manufacturers Association (NWMA), manufacture materials and components used in construction throughout the United States. Together, these associations represent a substantial segment of the construction industry.

The amici joining herein have wide experience with the problems in the construction industry resulting from secondary boycotts effectuated through diverse union

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[1] The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

conduct. As construction industry designers, engineers and manufacturers, the amici are affected directly and substantially by labor and work rule restrictions that reduce the latitude of construction contractors to select the most appropriate methods, materials and components. Accordingly, they have participated individually, jointly and with other industry associations in many cases before the National Labor Relations Board ("NLRB" or "the Board") and the courts in which the interpretation and application of the secondary boycott provisions of the National Labor Relations Act were in issue.[2]

The issues presented for the Court's consideration in these cases are of crucial importance to the amici. Of particular concern is the use of union subcontracting agreements to effectuate product boycotts unrelated to the legitimate interests of unions in setting wage rates and working conditions. The amici are concerned that under the Ninth Circuit's ruling, project owners, architects and engineers will often be left without the option of utilizing prefabricated or factory-assembled components which unions refuse to install, since the general contractors may be barred from dealing with all nonunion subcontractors who are free to install such components.

STATEMENT OF THE CASE

The Ninth Circuit ruling under review[3] addresses two separate cases of secondary conduct which were consolidated at both the NLRB[4] and appellate court levels.

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[2] *E.g., NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507 (1977); *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

[3] References herein to the opinion of the limited *en banc* panel of the court of appeals are cited to Appendix A of the petition for certiorari in No. 80-1798.

[4] These two cases, along with several other cases, were initially consolidated for oral argument by the NLRB in 1978. Among the cases was *Donald Schriver, et al. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981).

One case (No. 80-1798) concerns a proposed collective bargaining agreement which two Carpenters Union locals sought to negotiate with a framing subcontractor, Woelke & Romero Framing, Inc. ("Woelke"), after the then-current agreement lapsed. One of the clauses would have forbidden Woelke to subcontract jobsite work except to firms having a current agreement with the Carpenters.[5] Following an impasse in bargaining, the unions picketed Woelke, and workers employed by other subcontractors stopped work on some of the projects in which Woelke was involved.

Upon charges filed by Woelke, the NLRB's General Counsel issued a complaint against the Carpenter's Union locals alleging that they violated Section 8(b)(4)(i) and (ii)(A)[6] of the National Labor Relations Act, *as*

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[5] The proposed clause, reproduced at Cert. Pet. No. 80-1798 App. A at 5 n.4, provides:

> "The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement."

[6] Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce

amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395), 29 U.S.C. § 151 *et seq.* (1976) (the "Labor Act"), by picketing Woelke at various jobsites with an object of forcing it to enter into an agreement prohibited by Section 8(e)[7] of the Labor Act. The case was submitted to the NLRB upon a stipulation of facts and the Board held that the construction industry proviso to Section 8(e) protected the proposed subcontracting agreement and that the picketing designed to secure acceptance of the clause did not violate Section 8(b)(4). 239 N.L.R.B. 241 (1978).

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or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . ."

[7] Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work. . . ."

The second case (Nos. 80-1808 and 81-91) emanates from a collective bargaining agreement negotiated by an Engineers Union local and a chapter of the Associated General Contractors (AGC). The agreement precluded AGC employers from assigning work to any subcontractor not having a current agreement with the Union.[8] Upon charges filed by a chapter of the Associated Builders and Contractors (A.B. & C.), the General Counsel issued a complaint alleging that the subcontracting restriction violated Section 8(e) of the Labor Act. The NLRB upheld the legality of the clause but struck down a self-enforcement provision which allowed the union to strike or picket to enforce the subcontractor clause. 239 N.L.R.B. 274 (1978).

The cases were subsequently consolidated for review in the Ninth Circuit, where a three-judge panel initially reversed the Board in material part and sustained the employers' petitions for review. 609 F.2d 1341 (9th Cir. 1979). Thereafter, the court of appeals granted petitions for rehearing *en banc* and ordered the matters reheard before a limited *en banc* panel as provided by statute and local rule. On April 17, 1981, the limited *en banc* panel of the Ninth Circuit issued its opinion and judgment affirming the decisions and orders of the Board. Cert. Pet. No. 80-1798 App. A.

SUMMARY OF ARGUMENT

The amici submit that the decision of the Ninth Circuit permits a form of union conduct which Congress sought to prohibit through the secondary boycott and hot cargo restrictions in Sections 8(b)(4) and 8(e) of the

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[8] The restrictive clause, reproduced at Cert. Pet. No. 80-1798 App. A at 2, reads in pertinent part:

> "Employers shall not contract any work covered by this Agreement to be done at the site of the construction . . . to any person, firm, or company who does not have an existing labor agreement with the Union covering such work."

Labor Act. The court of appeals' conclusion that a construction industry subcontracting clause, plainly secondary in scope and effect, is lawful merely because it is promoted within the context of a collective bargaining relationship has no basis either in the statute or in its legislative history. Rather, the thrust of the Act's secondary boycott provisions, previously recognized by the Ninth Circuit itself in *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975), is to proscribe restrictive subcontracting clauses whenever they extend beyond particular jobsites or are effective whether or not employees of the contractor are engaged in *bona fide* work at the site. The limited *en banc* panel's obvious reliance on the District of Columbia Circuit's lengthy opinion in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981), to overturn the initial panel decision in this case, is sorely misplaced. The D.C. Circuit's opinion, as reflected in the opinion of the limited *en banc* opinion here, is grounded upon bits and pieces of legislative history, taken out of context and supported by fallacious *post hoc* reasoning.

The Ninth Circuit's decision is equally troublesome for its failure to acknowledge and to apply interrelated principles of federal labor and antitrust law proscribing plainly anticompetitive activities. In *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 613 (1967), this Court noted that Congress had intended Section 8(b)(4) to serve the dual objectives of preserving the right of labor organizations to bring pressure to bear on employers in primary labor disputes and of shielding neutral employers from pressures in controversies not their own. 386 U.S. at 626-27, *citing NLRB v. Denver Building & Construction Trades*, 341 U.S. 675 (1951). Thereafter, this Court in *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), cautioned that a proper accommodation of labor and antitrust principles requires that the construction industry proviso to

Section 8(e) be given limited scope. The subcontracting clauses here under review "indiscriminately exclude[d] nonunion subcontractors from a portion of the market," 421 U.S. at 624, and thus violate the spirit, if not the letter of these cases.

Accordingly, we join in the arguments advanced by the petitioners that the union signatory subcontracting provisions here challenged violate the secondary boycott prohibitions of the Labor Act. The decision of the limited *en banc* panel, if allowed to stand, would threaten competition based upon efficiency of operation and technology in the construction industry. Specifically, it would allow unions to compel general contractors to cease doing business with, or otherwise bring pressure upon, subcontractors, engineers, architects and others involved in construction projects on the basis of union status, even where different jobsites are concerned. The result would be to extend to an unnecessary and unwarranted degree the restrictive job rules and work practices which typify union construction, with the concomitant effect of curtailing the use of prefabricated and factory-assembled products and components and forcing resort to inefficient jobsite methods.

ARGUMENT

THE UNION SIGNATORY SUBCONTRACTING AGREEMENTS ARE NOT PRIVILEGED BY THE CONSTRUCTION INDUSTRY PROVISO TO SECTION 8(e) BECAUSE THEY EXTEND BEYOND PARTICULAR JOBSITES AND ARE EFFECTIVE WHETHER OR NOT EMPLOYEES OF THE CONTRACTOR ARE ENGAGED IN *BONA FIDE* WORK AT THE JOBSITE

A. Introduction

The restrictive subcontracting agreements here under review compel the signatory contractor never to engage any nonunion subcontractor—or, for that matter, any subcontractor who is not signatory to an agreement with a *particular* union—to work on any construction site, regardless of whether the contractor has employees of his own working there. It is widely recognized that such agreements tend to foreclose from the competitive construction market nonunion contractors who are able to employ efficient methods and innovative products, processes and techniques.[9] Indeed, their ultimate effect is to strengthen the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, thus aggravating the inflationary environment that particularly plagues this industry, to the detriment of the American public.[10]

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[9] The capability of construction craft unions to bargain so as to restrict materials and processes has long been recognized and criticized by commentators. See Note, *Factory-Built Housing: Statutory Solutions*, 38 U. Chi. L. Rev. 788, 805-06 (1971); Note, *Union Restrictions on the Use of Prefabrication in the Housing Industry*, 55 Iowa L. Rev. 270, 278 (1969) ("Through the use of sections 8(b)(4)(B) and 8(e) and by utilizing the construction industry proviso, unions possess the power to exert economic pressure on the employer-contractor not to use new labor-saving devices"); Petro, *Unions, Housing Costs, and the National Labor Policy*, 32 Law & Contem. Prob. 319 (1967).

[10] According to an analysis published by the Department of Commerce, the poor labor productivity record of the construction

Through enactment of the secondary boycott provisions of Section 8(b)(4) and Section 8(e)'s prohibition against "hot cargo" agreements, Congress has specifically sought to eliminate the market restraints imposed by such restrictive practices. The Ninth Circuit's failure to acknowledge the full import of the statutory scheme and declare the subcontracting clauses here under review unlawful, we submit, requires that this aspect of its decision be reversed.

B. The Construction Industry Proviso Does Not Protect Union Signatory Subcontracting Agreements Not Tied Directly To Alleviating Jobsite Friction Between Union and Nonunion Workers

Having initially determined that the subcontracting clauses here involved were secondary and therefore within the scope of Section 8(e),[11] the Ninth Circuit proceeded to address whether the clauses nevertheless were exempted from that section's proscription by the con-

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industry in recent years has resulted in a serious rise in unit labor costs, which exceeds even the increase in the Department of Commerce Composite Construction Cost Index. MacAuley, *Economic Trends in the Construction Industry, 1965-80*, Construction Review 15 (Dept. of Commerce May-June 1981). A table calculating the index of unit labor costs for construction workers, 1965-80, is reproduced in the appendix to this brief, *infra* p. 1a.

Subcontracting accounted for approximately 30% of the construction work done in 1977. Construction Review, *supra* at 7.

[11] The Ninth Circuit's conclusion that the subcontracting clauses are secondary in objective, within the meaning of *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967), plainly is correct. The court's apologia for applying secondary boycott principles to the construction industry, however, is both inappropriate and unwarranted. Although the court properly acknowledged its obligation to adhere to the primary-secondary distinction between secondary employers working the same jobsite in the construction industry, *NLRB v. Denver Building & Construction Trades*, 341 U.S. 671 (1975), it eschewed the opportunity to ground its decision as well upon compelling practicalities supporting its result. See Part D of this Argument, *infra*.

struction industry proviso. Apparently taking its cue from the earlier District of Columbia Circuit's opinion in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981), which parallels the opinion here in both its analytical framework and result, the Ninth Circuit concluded that Congress had fashioned the proviso to "preserve the pattern of collective bargaining in the construction industry," and, accordingly, sought to uncover the pre-1959 pattern. 635 F.2d at 879; Cert. Pet. No. 80-1798, App. A at 17. On the basis of nothing more than several opaque remarks of Senator Kennedy during legislative debate,[12] and a study of pre-1959 construction subcontracting clauses, which had been dismissed by the Board's General Counsel as inconclusive,[13] the Ninth Circuit declared such restrictive agreements within the "pattern" Congress sought to preserve. In so doing, it reversed itself [14] and disregarded law of its own circuit,[15] other cir-

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[12] Cert. Pet. No. 80-1798, App. A at 18-19. This Court has repeatedly cautioned against relying upon the expressed views of an individual congressman in the course of legislative debate to ascertain Congressional intent. See *United States v. UMW*, 330 U.S. 258, 282 (1946); *Duplex Co. v. Deering*, 254 U.S. 443, 474 (1920).

[13] Cert. Pet. No. 80-1798, App. A at 20-21, *citing* Lunden, *Subcontracting Clauses in Major Contracts*, 84 Mon. Lab. Rev. 579 (pt. I), 715 (pt. II) (1961). For criticism of the Lunden study's methodology, see Office of the General Counsel Memorandum 76-57, December 15, 1976, *reprinted in* Labor Relations Yearbook 1976, 295, 308-09.

[14] In its initial inquiry into the proviso's purpose, a panel of the Ninth Circuit construed the proviso as one designed to minimize jobsite tension. 609 F.2d 1341, 1349. Because the agreements operated even when no union workers were at the jobsite, they exceeded the purpose of the proviso. The panel added that its holding preserved the section 7 rights of workers to engage in or refrain from union activity. *Id.* In order to protect those rights, it was necessary to restrict the top-down organizing potential of subcontracting agreements. *Id.* at 1350.

[15] *Acco Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975) (underlying congressional concern to minimize

cuits,[16] and a well-reasoned memorandum previously issued by the General Counsel,[17] all indicating that the proviso encompasses only union signatory subcontracting clauses designed exclusively to alleviate jobsite tension that arises when union and nonunion personnel work together at the same construction site.

In fact, the legislative history of the 1959 Act reflects only a Congressional intent to preserve pre-1959 *law*. H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), *reprinted in* I Legislative History of the LMRDA of 1959, 942 ("Legislative History"). For, as acknowledged even by a commentator supporting the Ninth Circuit

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jobsite tension); *Associated General Contractors of Cal., Inc. v. NLRB*, 514 F.2d 433, 439 (9th Cir. 1975) ("The construction industry proviso was designed to enable employers and unions to prevent friction between union and nonunion employees on the same jobsite").

[16] *Essex County & Vic. Dist. Council of Carpenters v. NLRB*, 332 F.2d 634 (3d Cir. 1964) (proviso granted to deal with problem of craft unionists working alongside nonunion men), *cited with approval in National Woodwork Manufacturer Ass'n v. NLRB*, 386 U.S. 612, 639, n.32 (1967); *International Union of Operating Engineers Local 542 (York County Bridge, Inc.)*, 216 N.L.R.B. No. 67, 88 L.R.R.M. 1405, 1407 (1975), *enf'd*, 532 F.2d 902 (3d Cir. 1976) (the proviso "was intended to prevent labor strife among nonunion and union employees at the same jobsite"). Until *Schriver*, the law of the D.C. Circuit was to the same effect. *Drivers, Salesmen, Etc., Local 695, v. NLRB*, 361 F.2d 547, 555 (D.C. Cir. 1966).

[17] The General Counsel analyzed various types of subcontracting restrictions in light of this Court's decision in *Connell*. The General Counsel concluded that clauses extending to jobsites where the signatory contractor does not use any employees of his own, or to phases of construction when the signatory's employees would not be present, are "broader than required by the union's legitimate interests" and, therefore, "are not within the scope of the proviso." Office of the General Counsel Memorandum 76-57, *supra* note 13 at 301-02. The General Counsel's office was, of course, required to abandon this interpretation of the proviso when the Board issued its contrary holding in these cases.

result, "construction practices prior to the 1959 amendments *reveal no pattern.*" Comment, *The Scope of Hot Cargo Agreements in the Construction Industry*, 69 Geo. L.J. 1309, 1323 (1981) (emphasis added). Furthermore, a brief review of the overall Congressional approach to construction labor relations reveals that the Ninth Circuit's rationale defeats almost entirely Congress' unique scheme for restricting secondary activity in the industry.

The Congressional intent embodied in the construction industry proviso can be gleaned most clearly from its comparison with the other industry-excluding proviso in Section 8(e), which concerns the garment industry.[18] The legislative history of the garment industry proviso plainly shows "it was designed to allow secondary pressures to counteract the effects of sweatshop conditions in an industry with a highly integrated process of production between jobbers, manufacturers, contractors and subcontractors." *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. at 638. In drafting the garment industry proviso, Congress demonstrated clearly an intent to negate Section 8(e)—and, perforce, Section 8(b)(4)(B). The sharp distinction in its approach to the construction industry, wherein reference is made to the construction site by use of the definite article,[19] establishes an inten-

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[18] The garment industry proviso, 29 U.S.C. § 158(e) (1976), reads:

> "*Provided further*, that for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry:"

[19] The D.C. Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d at 877, suggested that its open-ended reading of the construction industry proviso was supported, in part, by its "literal wording."

tion to provide therein "only a fragmentary exclusion from the reach of Section 8(e)." Petro, *supra* note 9, at 344. *Cf. Connell Construction Co. v. Plumbers Local 100* 421 U.S. 616, 628. To interpret the construction industry proviso, in practical effect, almost as broadly as the garment industry proviso plainly frustrates Section 8(e)'s design.

Further support for a reading of the construction industry proviso that limits subcontracting restrictions to instances of potential jobsite friction is derived from Section 8(f) of the Labor Act.[20] That section makes law-

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To the contrary, however, had Congress not been motivated by the need to avoid union-nonunion jobsite friction at "*the* site of *the* construction," it could easily have employed the indefinite article ("a site of construction") to clarify permitting the proviso to be used as a broad organizational weapon. (Emphasis added.)

[20] Section 8(f), 29 U.S.C. § 158(f) (1976), reads as follows:

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the

ful a collective bargaining agreement in the construction industry notwithstanding that the signatory union has not achieved majority status. But as this Court declared in *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 345 (1978), "[t]he employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." In ruling that the union violated Section 8(b)(7)[21] in that case when it extended picketing to enforce a prehire agreement without a showing of majority support, this Court's opinion demonstrated the consistent commands of the Labor Act that union activity aimed at expanding its control be tied to the direct, legitimate and *demonstrable* interests of its identifiable members, even in the construction industry. "Congressional concern about coerced designation of bargaining units," this Court declared, "did not evaporate as the focus turned to the construction industry. . . ." 434 U.S. at 347-48.

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final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

[21] Section 8(b)(7), 29 U.S.C. § 158(b)(7) (1976), places several restrictions upon primary recognitional picketing. In *Donald Schriver, Inc. v. NLRB*, 635 F.2d at 876, the D.C. Circuit ruled that unions may picket, within the confines to Section 8(b)(7), to obtain a pre-hire agreement containing a hot cargo clause and still be within the protection of the construction industry proviso. The effect of this ruling is to create an unlimited secondary weapon. As several commentators have observed, under the D.C. Circuit's ruling, "a union [may] demand a hot cargo agreement from an employer with whom there was no pre-existing relationship of any kind—*as long as* the union ostensibly aims to represent the employer's workers." Dereshinsky, Berkowitz & Miscimarra, The NLRB and Secondary Boycotts 309 n.331 (rev. ed. 1981) (emphasis in original).

C. The Ninth Circuit's Interpretation Of The Construction Industry Proviso Is Contrary To The Spirit, If Not The Letter, Of *Connell*

In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975), a construction industry union sought to obtain from a general contractor with whom it had no collective bargaining relationship an agreement to subcontract only to union subcontractors. Since this Court determined that such agreements were valid only when negotiated within the context of a collective bargaining relationship, 421 U.S. at 633, it had no occasion to rule specifically that the defendant's restrictive subcontracting agreement was unlawful on the ground that it was not confined to "common situs relationships on particular jobsites as well." *Id.* But, after explaining that the construction industry proviso was adopted by Congress as a compromise between those legislators who wanted Section 8(e) to ban all hot cargo and those who wanted the provision only to prohibit agreements in the trucking industry, this Court emphasized that Section 8(e)'s legislative history revealed an intention to give the proviso only limited application:

> "Discussion of 'special problems' in the Construction industry . . . focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between the contractors and subcontractors at the jobsite. Congress limited the construction industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from § 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon."

421 U.S. at 629-30 (footnote omitted).

The Ninth Circuit's opinion "concede[s] at the outset that the *Connell* opinion contains considerable em-

phasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to 'top-down' organizing that is one of the effects of subcontractor agreements." Cert. Pet. No. 80-1798 App. A at 23. The circuit opinion, however, goes on to reject summarily any application of those concerns to the case at bar. In so doing, we submit, the Ninth Circuit exposed its fundamental misapprehension of *Connell*. This Court's view of the construction industry proviso and its relationship to the entire scheme of the Labor Act was not a gratuitous exercise, signifying nothing. Therein, in fact, lies the overriding rationale of *Connell*: ". . . to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." 421 U.S. at 632.[22]

Connell teaches that a proper accommodation of federal labor and antitrust policies requires that the construction industry proviso be given limited scope. It protects jobsite subcontracting restrictions only to the extent that they relate to legitimate union interests growing out of circumstances unique to the construction industry. This Court did not undertake to define in *Connell* precisely what union interests qualify for this protection, but the focus of the Court's discussion was upon the

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[22] As one commentator has noted, *Connell* "seems to leave little room for any top-down organizational impact in its analysis of the proviso's purpose. The Court not only implied that the proviso was designed primarily to permit the avoidance of work stoppages due to *Denver Building Trades* problems, but also emphasized that section 8(f) was the only consideration given to construction unions seeking to widen their base." Note, *Hot-Cargo Agreements in the Construction Industry: Restraints on Subcontracting Under the Proviso to Section 8(e)*, 1981 Duke L.J. 141, 179. Even in criticizing the *Connell* decision, the author conceded that *Connell* "might imply" a denial of proviso protection to a subcontracting agreement with a vast potential, intended or not, to organize from the top down. *Id.*

concerns expressed in Congressional debates preceding Section 8(e)'s enactment about "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." 421 U.S. at 631, quoting from *Drivers Local 695 v. NLRB*, 361 F.2d 547, 557 (D.C. Cir. 1966). Thus, it is clear that subcontracting restrictions which go no farther than is necessary to prevent such possible jobsite friction—i.e., collectively bargained agreements which do no more than bar the signatory contractor from engaging nonunion firms to work on jobsites where his unionized employees are currently working—are protected by the proviso even though they entail some restraint on competition and efficiency. But by the same token, subcontracting restrictions not so limited—*i.e.* restrictions which multiply anticompetitive pressures without a corresponding justification based upon legitimate union concerns, such as the agreements challenged in this case—are not protected.

D. To Permit Restrictive Subcontracting Agreements Solely on the Basis of a Collective Bargaining Relationship Would Unjustifiably Threaten Competition Based Upon Efficiency of Operation and Technology in the Construction Industry

The Court has recognized that national labor policy requires tolerance for the lessening of business competition only on the basis of legitimate union objectives. *UMW v. Pennington*, 381 U.S. 657 (1965); *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965). The restrictive agreements here under review not only are unjustifiable on such grounds, but they present serious barriers to the development and maintenance of an economically-sound construction industry. If allowed to stand, the court of appeals' holding that Section 8(e) permits unions in the construction industry to force *any* contractor with whom they have any sort of bargaining relationship to agree not to do business at *any* site at *any*

time with *any* subcontractor whose employees have chosen the "wrong" union,[23] or no union, will seriously endanger not only employee freedom of choice[24] in the construction industry, but also the survival of competition based upon efficiency of operation and technology. Certainly after *Connell*, 421 U.S. at 623, it should be plain that where union signatory agreements are concerned, this Court intends that the Board and the courts look beyond the facade of collective bargaining and also measure the magnitude of the restraint on the product market.[25]

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[23] The Ninth Circuit's decision explicitly endorses restrictive clauses requiring a collective bargaining agreement with a particular union. Cert. Pet. No. 80-1798, App. A at 39.

[24] The Ninth Circuit's ruling plainly has the effect of restricting the rights of the employees of neutral nonunion subcontractors to choose freely whether to organize. Knowing that their employer will lose eligibility to bid on contracts with the signatory general contractor on the basis of their nonunion status, they are thus compelled to adopt unionization from the "top-down" for purposes completely distinct from those which may emanate from relationships with their own employer.

[25] Additional evidence of the anti-competitive nature of these restrictive subcontracting agreements can be ascertained when such agreements are measured against the substantial body of law prohibiting shelter for union agreements and practices that violate federal antitrust laws. As far back as *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945), this Court held that a union-induced employer's concerted refusal to deal was a violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-8, *as amended*, 15 U.S.C.A. §§ 1-7, 15, despite the direct effect of the agreement on employees' wages and working conditions. In *Connell*, this Court made clear that other adjudicatory bodies may consider and decide matters arguably implicating the Labor Act where such matters arise in the context of a possible federal antitrust violation. 421 U.S. at 626. Particularly relevant to the cases here under review is *In re Teamsters Local 959*, 93 F.T.C. 739 (1979), wherein the Federal Trade Commission attacked subcontracting agreements on antitrust grounds. The consent order required, among other things, an Anchorage, Alaska labor union local to cease entering into agreements which require signatory construction companies to deal only with subcontractors who agree with the same

Restrictive subcontracting agreements of the sort involved in these cases are, by their very nature, secondary and anticompetitive devices. Their entire purpose is to exclude nonunion subcontractors from a portion of the competitive construction market. But their ultimate effect on efficiency and productivity in the industry involves much more than just the elimination of *subcontractors* from the competition. For in the process, they also effectively eliminate many efficient *methods* and innovative *products* from use in construction. By strengthening the impact of the restrictive work rules and jurisdictional limitations that characterize unionized construction, such agreements aggravate the inflationary environment that particularly plagues this industry, to the detriment of the national economy.

The members of the associations joining in this brief know from long experience that the anticompetitive impact of broad subcontracting restrictions, like the ones involved in these cases, inevitably extends far beyond competition based on wages and working conditions. For a construction contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union-approved wage rates and working conditions, but also, almost invariably, to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where it is engaged. When applied during the course of a construction project, these restrictions impose severe limitations on the ability of the project owners, designers and general contractors to utilize the methods they deem most desirable for the particular job.[26]

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terms and conditions binding between the union and the contractors. The order explicitly allowed § 8(e) agreements "as long as said agreement is only effective when a member of the bargaining unit represented by respondent is employed and currently working at the site of the construction, alteration, painting or repair of the building, or other work." 93 F.T.C. at 742.

[26] The importance of the proviso to unions is that, among other things, it permits them to coerce employers not to handle pre-

Were it possible for the nonunion subcontractor to challenge these anticompetitive union signatory rules where the requirements of *Connell* are not met, the restrictions upon neutral subcontrators in their selection of materials might be less onerous. What is particularly grevious about the lower court's decision, however, is that, if it is enforced, in the vast majority of cases the nonunion subcontractor would have no opportunity under the Labor Act to challenge the *bona fides* of the restrictive work practices. Thus, a nonunion contractor who becomes involved in a dispute over the application of a subcontracting clause often is bound by the substance and procedure of the grievance machinery contained in the agreement between the general contractor and the union. Contract grievances in the construction industry most often are heard by a panel composed of an equal number of unionized employer and union representatives. Since the unionized contractors are burdened by the provisions imposed by their collective bargaining agreement, their interest in seeing that subcontractors fully comply with the terms of the agreement is no less than that of the unions. Thus, the issues typically are decided by a panel in which the nonunion subcontractor is without representation. Moreover, the panel decision is binding as law upon covered employers and enforceable in court. *Cf. United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). The standard for review of a grievance committee decision is narrow, and the courts will not ordinarily evaluate the merits of the decision.

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fabricated products on the jobsite even when their objectives are plainly secondary. An open-ended reading of the proviso, of course, would make this practice virtually unlimited.

Expanded use of prefabricated techniques in the building industry offers an opportunity for reducing the cost of housing construction. Precutting materials in the factory to be assembled on the jobsite or manufacturing an entire housing unit in sections which will be erected on the jobsite offer substantial saving in both materials and labor. *See generally* the law review articles cited in note 9, *supra*.

Safeway Stores v. American Baking & Confectionary Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968). See Moeller, Jr., *Employee Rights and Antitrust Liability: Organized Labor's Exemption After Connell*, 48 Miss. L.J. 713 (1977).

In sum, only a strict reading of the proviso that limits the applicability of restrictive subcontracting agreements to jobsites where union-nonunion friction is possible accommodates the important public interest favoring competition based on efficiency in construction, while still protecting the interest of building trade unions in preserving jobsite peace. Accordingly, the restrictive agreements here under review should be declared unlawful specifically on the ground that they extend beyond particular jobsites and are effective whether or not employees of the contractor are engaged in *bona fide* work at the site.[27]

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[27] The Ninth Circuit upheld the Board's determination in Nos. 80-1808 and 81-91 that the subcontracting provision ultimately was not protected by the Section 8(e) construction industry proviso because of the collective bargaining agreement's "self-enforcement" provisions. Cert. Pet. No. 80-1798 App. A at 41-43. Under this provision, the parties were authorized to take "any action deemed necessary" to enforce an established grievance arbitration procedure, which would cover disputes concerning restrictive subcontracting. Because Congress expressly indicated that agreements saved by the proviso could not be enforced by conduct violative of Section 8(b)(4), I *Legislative History*, *supra* at 943, this conclusion plainly is correct.

CONCLUSION

For the foregoing reasons, and those advanced in the briefs of the several petitioners, we submit that the judgment of the limited *en banc* panel of the Ninth Circuit be reversed with instructions to remand the cases to the Board to have these subcontracting agreements declared unlawful on the ground that they extend beyond particular jobsites and are effective whether or not employees of the contractor are engaged in *bona fide* work at the jobsite.

Respectfully submitted,

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November 19, 1981

Reproduced From Construction Review, p. 16 (Dept. of Commerce May-June 1981) :

Table 9.—Calculation of Index of Unit Labor Costs for Construction Workers, 1965-80

Year	(a) Construction workers: Average hourly earnings (Current dollars)	(b) Construction workers: Index of average hourly earnings (1965=100)	(c) Productivity of construction workers: Output per hour worked by all persons (1972 dollars)	(d) Productivity of construction workers: Index of output per hour worked by all persons (1965=100)	(e) Index of unit labor costs (b÷d) (1965=100)
1965	$3.71	100	$8.64	100.0	100
1966	3.81	103	8.21	97.0	106
1967	4.11	111	8.11	95.9	116
1968	4.41	119	8.42	99.5	120
1969	4.79	129	7.78	92.0	140
1970	5.24	141	7.66	90.5	156
1971	5.69	180	8.18	96.7	186
1972	6.06	163	8.15	96.3	169
1973	6.41	173	7.70	91.0	190
1974	6.81	184	7.02	83.0	222
1975	7.31	197	7.23	85.5	230
1976	7.71	208	7.30	86.3	241
1977	8.10	218	7.60	89.8	243
1978	8.66	233	7.27	85.9	271
1979	9.27	250	6.76	79.9	313
1980	9.94	268	n.a.	n.a.	n.a.
	Percent change				
1965-79	+150	+150	−20	−20	+213

n.a.—Not yet available.

Source: Calculated by Bureau of Industrial Economics (BIE) from data developed by the Bureau of Labor Statistics and the Bureau of Economic Analysis.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-91

OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 80-1798

WOELKE & ROMERO FRAMING, INC., *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND CARPENTERS LOCAL 235 UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE ASSOCIATED BUILDERS AND CONTRACTORS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Associated Builders and Contractors (hereafter ABC) is a national trade association composed of approximately 17,000 independent construction and construction supplier companies operating primarily on an open shop basis throughout the United States. ABC is founded on the "merit shop" philosophy, i.e., that the opportunity to bid and compete for construction work should be based on the ability to operate efficiently and to offer quality service at a reasonable cost. ABC contractors, therefore, do not believe success or failure in the construction industry should depend on a company's union or nonunion status.

ABC members perform the majority of their work in the commercial, industrial, and institutional areas, with commercial projects far outranking the other areas. In fact, eighty-five percent of ABC members do some commercial work. For nearly forty percent of our members, commercial construction represents one-half of their workload. Industrial and institutional construction also comprises a substantial portion of member work. The average number of workers employed by ABC firms averages forty-one per employer. Nevertheless, approximately one-half of all ABC members employ twenty or less workers, which places the typical firm squarely in the small business category.

Over eighty percent of all ABC employers work, on occasion, with union firms and three-fourths of them award between ten and thirty percent of their subcontracts to union firms.[1] The construction of many commercial and industrial projects requires the employment of multiple crafts. It is standard practice for general contractors to subcontract work to construction employers, both union and nonunion, based on a plethora of

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[1] These statistics were recently compiled by Opinion Research Corporation of Princeton, N.J., in a 1981 survey of over 2,500 ABC members.

factors such as price, quality of work, efficiency of operation, availability and geographical location of the subcontractor. The co-mingling of union and nonunion employers on the same building project, which is commonplace in the construction field, creates the "mixed" jobsite. Union signatory subcontracting clauses are aimed at alleviating the friction that sometimes occurs on "mixed" jobsites between union and nonunion employees.

As stated above, an overwhelming majority of ABC members work shoulder-to-shoulder with union firms on occasion. Broad union signatory subcontracting clauses that prevent this customary work practice, even when there is no potential for jobsite friction, will force many open shop firms, that are now awarded subcontracts by union general contractors to either sign a union contract or forego competing for this "mixed" job market. Furthermore, the open shop employer, unlike his union counterpart, must often maintain a full-time work force because they have no union hiring hall system to rely on. Broad union signatory subcontracting clauses will reduce the amount of work available to ABC members and require reductions and lay-offs of their full-time employees, causing further erosion of this nation's economy.

The Court's decision in this case — whether union signatory subcontracting clauses should be restricted in the construction industry to alleviating jobsite friction between union and nonunion employees — will largely determine to what degree open shop contractors will be able to compete and survive in the free enterprise system.

SUMMARY OF ARGUMENT

The issue of the proper scope of Section 8(e), 29 U.S.C. § 158(e), of the National Labor Relations Act, as it relates to construction industry subcontracting clauses, was previously decided by this Court in *Connell Construction Co.* v. *Plumbers*

and Steamfitters, Local Union 100, 421 U.S. 66 (1975), and should have been followed by the *en banc* Court of Appeals. The mere fact that *Connell* arose from an anti-trust action and that there was no collective bargaining relationship between the union and the union general contractor in *Connell* is not of controlling significance. The *Connell* court, of necessity, had to exhaustively scrutinize Section 8(e) and its construction industry proviso to determine whether a subcontracting agreement between the parties, similar to the subcontracting clauses considered below, had the primary objective of organizing other employers or whether the provision was directed to the labor relations of the contracting employer, vis-a-vis his own employees, and thus entitled to the statutory labor exemption from the operation of the anti-trust laws.

The *Connell* court held that a similar subcontracting clause, as presented below, was not entitled to the protection of the construction industry proviso to Section 8(e), because it was not aimed at reducing jobsite friction between union and nonunion employees. Therefore, the *en banc* Court of Appeals, in finding that *Connell* was not controlling, was in error.

The legislative history behind the enactment of Section 8(e) reveals that Congress was principally concerned with curbing the pernicious effect of "hot cargo" agreements. These agreements enmeshed companies neutral to a labor dispute, between the union and some other employer, into an economic boycott of the employer that was the subject of the union's labor objectives. The construction industry proviso to Section 8(e) reserves a partial exemption to the general congressional ban on "hot cargo" agreements for construction employers and unions, when the purpose of their subcontracting clauses (hot cargo agreements) is limited in scope to the reduction of jobsite friction between union and nonunion employees. Furthermore, the legislative history behind the construction industry proviso to Section 8(e) does not reveal a congressional intent to arm

building trades unions with an unlimited "top-down" organizing weapon against construction employers, whereas, this was the very evil aimed at by Section 8(e). The pattern of collective bargaining prior to 1959 indicates that there was no standard subcontracting clause in the construction industry that would support the en banc Court of Appeals finding that "union signatory" subcontracting clauses were prevalent antecedent to the enactment of Section 8(e).

A decision by this Court that construction employers and unions can restrict the subcontracting of work to firms signatory to a particular collective bargaining agreement, even when the construction employer has no employees present at the jobsite represented by the labor organization, or at other times when there is not even a remote possibility for jobsite friction between union and nonunion employees, will force open shop employers to sign "top-down" collective bargaining agreements in order to compete for work, and will frustrate the strong federal labor policy of giving employees an unfettered right to choose their own bargaining representatives.

Construction unions already have the legitimate means to effectively organize employees and to protect their members' other interests on a construction site, without expanding the scope of the construction industry proviso to Section 8(e).

ARGUMENT

I. The *En Banc* Court Of Appeals Improperly Concluded That This Court's Decision In *Connell Construction Co. v. Plumbers And Steamfitters, Local 100*, 421 U.S. 616 (1975) Was Not Controlling As To The Cases Below.

This Court last examined the proper scope of Section 8(e) and its construction industry proviso in *Connell Construction Co.* v. *Plumbers and Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975). While *Connell* arose in the context of an anti-trust action, this Court of necessity had to scrutinize the legislative history and meaning behind Section 8(e) in order to determine whether a "hot cargo" agreement between a union and a general contractor was within the construction industry proviso to Section 8(e), and therefore protected by federal labor policy from the proscription and operation of the anti-trust laws. The union in *Connell* sought an agreement from a union general contractor that would have prevented the general contractor from subcontracting work to firms not yet signatory to a collective bargaining relationship with that particular union. The union did not have a collective bargaining relationship with the general contractor and specifically disclaimed any interest in representing any of the employees of the general contractor. Furthermore, the subcontracting clause would not have prevented the general contractor from subcontracting to nonunion firms not within the craft jurisdiction of that particular union, even if members of that union would have been present at jobsites conterminously with employees of nonunion contractors. Thus the subcontracting clause was not aimed at avoiding "shoulder-to-shoulder" friction between union and nonunion employees, which this Court concluded was at the heart of the construction industry proviso to Section 8(e).

> ". . . we think [the proviso's] authorization extends only to agreements in the context of collective-bargaining relationships, and in light of congressional references to

> the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633.

The *Denver Building Trades* problem, simply stated, is the potential for friction created when union and nonunion employees are forced to work side-by-side at the construction jobsite. As Justice William O. Douglas stated in his dissenting opinion in *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951),

> "The employment of union and nonunion men on the same job is a basic protest in trade union history. That was the protest here. The union was not out to destroy the contractor because of his anti-union attitude. The union was not persuing the contractor to other jobs. All the union asked was that union men not be compelled to work along-side nonunion men at the same job." 341 U.S., at 692.

Moreover, the *Connell* court did not quarrel with other court decisions it cited that have found the 8(e) proviso serves the narrow function of alleviating frictions that may arise when union men work continuously along-side nonunion men on the same construction project. *Connell, supra* at 630.

In spite of *Connell's* clear language that the primary federal labor policy underlying the 8(e) proviso was to alleviate jobsite friction, the *en banc* Court of Appeals did not adopt this "even narrower" reading of the proviso because in *Connell* the union did not purport to represent any of the interests served by the construction industry proviso since there was no collective bargaining relationship between the union and the general contractor. Therefore, the court below concluded that it was more in accord with the language of *Connell* to permit union signatory subcontracting clauses to apply to any jobsite at which an employer, who has a collective bargaining relationship with the union, is a contractor, even when there is no potential for jobsite friction.

The *en banc* Court of Appeals' reading of the scope of the 8(e) proviso not only does harm to its clear language but also ignores this Court's additional concern that unrestrained "union only" subcontracting clauses would arm unions with a broader organizational weapon than Congress intended when enacting the 8(e) proviso. The *en banc* Court of Appeals cavalierly acknowledged that unions clearly have secondary goals when they seek union signatory subcontracting agreements that include organizing the employees of nonunion subcontractors who have no connection with the primary bargaining unit employees of the union general contractor. The court below was able to justify this "top-down" organizing effect of subcontracting clauses because of the problems faced by construction unions in maintaining union wage rates and benefits such as retirement pensions and paid vacations for their members.

The *en banc* Court of Appeals found support for its theory that union subcontracting clauses are valid, even if their only purpose is to promote the union's interest in protecting its wages and benefits, in this Court's reasoning that the construction industry proviso is . . . "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there," . . . "*National Woodwork Manufacturers Assn'n* v. *NLRB*, 386 U.S. 612, 638-639 (1967).

Nowhere in *Connell*, or in any other case decided by this Court, has there been language suggesting that the "close community of interest," that the construction industry proviso preserves is the continuity of employer payments into union pension funds or the maintenance of other union benefits.

If anything, *Connell* stated a much narrower interpretation as to the "close community of interests" intended to be protected by the construction industry proviso, i.e.,

> "Local 100 . . . does not claim to be protecting Connell's employees from having to work along-side nonunion men.

> The agreement apparently was not designed to protect Local 100's members in that regard, since it was not limited to jobsites on which they were working. Moreover, the subcontracting restriction applied only to the work Local 100's members would perform themselves and allowed free subcontracting of all other work, thus leaving open a possibility that they would be employed along-side nonunion subcontractors . . ." *Connell, supra* at 631.

Connell is therefore unequivocal in its holding that the construction industry proviso was intended for the purpose of eliminating the "shoulder-to-shoulder" friction that results when union and nonunion employees work on the same construction jobsite. It was not designed as a tool for unions to create a "domino" organizing impact on nonunion firms who seek to gain subcontracting assignments from union general contractors, who in turn are subject to restrictive subcontracting clauses. As pointed out by this Court,

> "In contrast to the latitude it provided in the garment industry proviso, Congress did not afford construction unions an exemption from § 8(b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon." *Id.* at 630.

ABC agrees with this Court's restrictive view of the contruction industry proviso. We respectfully urge this Court to reject the *en banc* Court of Appeals decision that would permit union signatory subcontracting clauses to be operational at all construction locations where the signatory employer is present, even when the signatory union has none of its members present at a jobsite, where nonunion employees are working, so as to create the potential for union-nonunion friction among employees.

II. The Legislative History Of Section 8(e), 29 U.S.C. § 158(e), And The Actual Conditions Existing In The Construction Industry Prior To 1959 Do Not Support The Decision Below As To The Legitimate Scope Of Union Signatory Subcontracting Clauses.

The subcontractor clauses in these cases require that the employer not do business with another employer unless that employer has a labor agreement with the signatory union. A union signatory clause is normally secondary in nature, *Griffith Co.* v. *NLRB*, 545 F.2d 1194, 1199 (9th Cir., 1976), cert. denied, 434 U.S. 854 (1977). Section 8(e) was aimed at strengthening the prohibition in Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), against secondary activities, by forbidding agreements which might be used to circumvent the section's ban on the use of economic coercion for secondary objectives. *Connell, supra* at 628. However, the prohibition in Section 8(e) against hot cargo agreements was made subject to two exceptions: a broad exemption for the garment industry, and a more limited exemption for the construction industry. Respondents below argue that the construction industry proviso was meant to preserve in the construction industry the law as it existed, prior to the enactment of section 8(e). Although the garment industry proviso was supported by detailed explanations in both Houses of Congress, this Court found that the construction industry proviso was explained only by rare references to the "pattern of collective bargaining in the industry" (remarks of Senator Kennedy). Id. at 628. Legislative references indicate that Congress may have intended the construction industry proviso to maintain the status quo of the law, as to union subcontracting clauses, as it was understood in *Carpenters Local 1976* v. *NLRB (SandDoor)*, 357 U.S. 93 (1958). See *Connell* 421 U.S. at 629 (fn. no. 8). However, the agreement in *Sand Door* involved the use of nonunion material on a construction jobsite, not a subcontractor provision. Thus, the lawfulness of union signatory clauses such as those challenged was not determined in *Sand Door*. *Pacific Northwest*

Chapter of the Associated Builders and Contractors, Inc., et al. v. *NLRB, et al.*, 609 F.2d 1341, 1349 (9th Cir. 1979).

Even assuming there was a pattern of collective bargaining, as to subcontracting clauses, existing prior to 1959 when Section 8(e) was enacted, it is unclear what the nature of the "pattern" was.[2] It is obvious that Congress did not intend to ratify all union subcontracting clauses in existence prior to 1959, because the proviso's protection is limited to jobsite work. This eliminated the legality of some clauses that were in evidence prior to 1959, which boycotted the subcontracting of non-jobsite work as well.

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[2] "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic, i.e., many different practices that vary with the union and the geographic area involved. To say that Congress intended to preserve this 'mosaic pattern' would lead to the conclusion that the legality of a 'particular union' subcontracting clause today depends on whether the signatory union in the particular geographic area had such a clause in 1959. Absent express statutory language or clearly compelling legislative history, one would not infer that Congress intended to have different 8(e) results for different geographic areas and different construction unions, depending upon practices that existed 17 years ago.

In summary, the evidence does not clearly establish a 'pattern of collective bargaining' that would support a conclusion that Congress intended to sanction 'particular union' subcontracting clauses. Further, even assuming that the evidence did establish such a pattern of collective bargaining, the 'bare references' in the legislative history to the 'pattern of collective bargaining' do not, standing alone, indicate that Congress intended to freeze forever the *status quo* as it existed in 1959. The strong Section 7 policy of giving employees an unfettered right to change bargaining representatives and the Congressional distaste for 'top-down organizing' both point away from a policy of giving particular unions a preferred status in perpetuity." NRLB *General Counsel's Memorandum;* No. 75-57, p. 16 (1976).

While Congress intended to permit union signatory subcontracting clauses in the construction industry, as an exception to the general ban on hot cargo agreements, its main purpose in enacting the proviso was to permit these clauses as a means of alleviating the frictions that may arise when union men work continuously along-side nonunion men on the same construction site. *Drivers; Salesmen, etc., Local 695* v. *NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966). Although the legislative history of the proviso is often vague and inconclusive, what does emerge is an underlying congressional concern with minimizing jobsite tension. Where the employees of some contractors are union members and the employees of others are not, there is potential, or so Congress believed, for jobsite conflict. Of utmost significance is that the potential for conflict is likely to arise only when the nonunion laborers are in frequent and relatively close contact with union craftsmen. This is the problem Congress was primarily concerned with addressing through the proviso. *Acco Construction Equipment, Inc.* v. *NLRB*, 511 F.2d 848, 851 (9th Cir. 1975), *Connell, supra* at 630

Thus the purpose of the proviso was to allow unions and construction employers to avoid the problems attendant to co-mingling union and nonunion workers at the same jobsite.

Respondents below have argued that the construction industry proviso authorizes subcontracting agreements with contractors and in some circumstances with "stranger" contractors, without a collective bargaining relationship with the union, not limited to any particular jobsite. This Court has concluded that it is highly improbable that Congress intended such a result. "One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7), which restricts primary recognition-

al picketing and by further tightening section 8(b)(4)(B) of the Act, which prohibits the use of most secondary tactics in organizational campaigns." *Id.* at 632.

The construction industry proviso, though an exception to the section's general proscription, should not be interpreted to frustrate that objective.

Allowing union subcontracting clauses to be operational at all times and at all locations would also seriously undermine Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, which provides that employees have the right to engage in or refrain from engaging in any and all union activity. In addition if employees choose to unionize, they have the right to bargain "through representatives of their own choosing." A union signatory subcontractor clause operates to force non-union firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in section 7. Thus, the union signatory subcontracting clauses considered here are exactly the kind of tool for "top-down" organizing which this Court condemned in *Connell*.

III. Not Restricting Subcontractor Agreements To Jobsites Where Actual Friction May Occur Between Union And Nonunion Workers Will Have A Substantially Adverse Impact On The Open Shop Contractor's Ability To Compete For Construction Work.

Under the court below's holding, union signatory subcontractor clauses that require the contractor to subcontract work only to employers that have agreements with particular unions, are within the parameters of Section 8(e) and can be forced on firms involuntarily, by means of union picketing, as long as they are sought as part of a "collective bargaining relationship" between the parties. The *en banc* Court of Appeals opinion fundamentally departs from the principles set down in *Connell* and ignores and conflicts with the underlying federal labor

policy behind the construction industry proviso to Section 8(e) of the National Labor Relations Act.[3] In so doing, the *en banc* Court of Appeals decision undermines the ability of open shop contractors to compete fairly and freely with his union contractor counterpart for a share of the construction industry marketplace.

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[3] ". . . the fact that a clause requires the subcontractor to have agreements with particular unions is at least some indication that the signatory union's aim is to encourage subcontractors to recognize those particular unions, i.e., to organize from the 'top-down' these subcontractors. The inference is stronger if the 'favored' unions are the signatory union itself and/or fellow members of a trades council.

In addition, as indicated *supra*, Congress expressed a strong distaste in 1959 for 'top-down organizing.' If the proviso were construed to permit a contractual clause requiring that subcontractors be parties to agreements with particular unions, the foreseeable consequence would arguably be that subcontractors would be encouraged to enter into collective bargaining agreements with these particular unions. The subcontractors would realize that their eligibility to obtain subcontractors from the signatory general contractor would be dependent upon their entering into such collective bargaining agreements. In this fashion, the 8(e) proviso would encourage 'top-down organizing,' the very vice with which Congress was concerned in 1959.

Moreover, if the 8(e) proviso were construed to permit 'particular union' subcontracting clauses, there would be a negative impact on the exercise of Section 7 rights. If a subcontractor had a collective bargaining agreement with one of the 'particular unions,' his employees would be discouraged from ever changing bargaining representatives. Those employees would realize that a change in representation from the 'particular union' to some 'non-favored' union would mean that their employer would lose eligibility to bid on contracts with the signatory general contractor and this would mean a consequent loss of work for them. By 1959, the basic right of employees to freely choose and change bargaining representatives had existed for 24 years. It would be argued that Congress did not intend that the 8(e) proviso would operate to impede or impair the exercise of these well-established and important statutory rights." NLRB *General Counsel's Memorandum;* No. 75-57, p. IV, (1976).

Petitioners recognize that unions have been accorded both a statutory exemption and a non-statutory exemption from the operation of the anti-trust laws because of federal labor policy favoring union concerted activity that is aimed at establishing uniform wages and working conditions through collective bargaining agreements. See *Meat Cutters Local 189* v. *Jewel Tea Co.;* 381 U.S. 676. However, these exemptions do not give unions and employers the right to combine for the purpose of directly restraining competition in the business market. *Allen Bradley Co.* v. *IBEW Local 3,* 325 U.S. 798, 811. The union-signatory subcontracting clauses considered below, permit construction unions to place a direct restraint on a substantial segment of the construction market and impermissably boycott the nonunion contractor and his employees from competing for work they have traditionally performed. This Court correctly stated the pernicious effect and restraint on business competition created by broad union signatory subcontracting clauses in the construction industry.

> "In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the anti-trust laws strive to protect." *Connell, supra* at 633

Thus, federal labor policy does not require that unions have an unlimited privilege to impose restraints on those that employ its members. The inclusion of union signatory subcontracting clauses in collective bargaining agreements executed between labor organizations and union general contractors compels non-

union subcontractors to submit involuntarily to the unionization of their employees.[4]

The toleration of this undesirable consequence is unjustified in light of the alternative contract provisions which unions can employ to restrict the subcontracting of work. Many of organized labor's objectives can be protected by the execution of work preservation agreements with union general contractors. Under such a clause the general contractor cannot subcontract work which has been traditionally performed by employees covered by the collective bargaining agreement. In addition, the general contractor can be dissuaded from awarding contracts to nonunion employers by the execution of a "union standards" clause. An agreement of this nature provides that work can be subcontracted only to those employers which

---

[4] The "top-down" organizing impact of the union signatory subcontracting clause, that is neither limited to particular jobsites or to the elimination of jobsite friction, can best be demonstrated by using a hypothetical example: Union general contractor A has a subcontracting agreement with union X limiting the subcontracting of work to employers with collective bargaining agreements with union X or some other union in the local Building Trades Council. General contractor A subcontracts an entire project, requiring five different types of subcontractors, to non-union employers. All five non-union employers (B, C, D, E and F) agree to sign a collective bargaining agreement with union X or another member of the building trades council in order to work on the project. Each one of these non-union subcontractors is engaged in five other projects at a total of twenty-five different locations. None of the general contractors at these twenty-five other projects has an agreement with union X or with any other crafts in the local trade's council. Therefore, in order to protect the "community of interests" of the employees of employers B, C, D, E and F, union X demands and receives from these general contractors signed collective bargaining agreements, which also contain union signatory subcontracting clauses. These twenty-five general contractors, in turn, are told by union X that they must remove all non-union subcontractors from any other projects they are involved in or face a breach of contract action. Thus, the seed of just one union signatory subcontracting agreement has given union X and the Building Trades Council a "windfall" organizational gain.

observe the equivalent of union wages, hours, and conditions of employment. The successful negotiation of such a provision prevents a nonunion subcontractor from taking advantage of the potentially lower wage demands of his employees. Therefore, the labor policies of the various employers will not be determinative in the computation of bids for the general contractor. To this extent, an economic parity between all subcontractors is achieved, and union employers are not disadvantaged in acquiring contracts for construction work. In addition, unions can picket to gain both work preservation and union standard clauses in their agreements with employers because they are primary in nature, not secondary. See *National Woodwork, supra*.

Not only do work preservation clauses and union standards clauses effectively restrict the right of general contractors to subcontract work, but unlike union signatory subcontracting clauses, neither of these provisions permit the union to achieve the secondary objective of forcing a nonunion subcontractor to change his labor policy in order to compete for work. Furthermore, such a restrictive interpretation of the construction industry proviso to Section 8(e), by this Court, would not unduly hamper union pursuit of employment opportunities for their members, while preserving to the employees of the nonunion subcontractor the freedom to choose their own bargaining representative which is at the very heart of the National Labor Relations Act. Moreover, Respondents below exaggerate the alleged difficulties of organizing open shop contractors. Since open shop contractors do not rely on a hiring hall system of employment, they must of necessity maintain stable work forces that are no less accessible to union solicitation, at work or in their homes, than industrial or retail employees. Construction unions are also free to engage in organizational picketing of the nonunion contractor at the jobsite within the proscribed limits of Section 8(b)(7) of the National Labor Relations Act, 29 U.S.C. 158(b)(7). Member firms of this association have

been successfully organized in the past by means of primary recognitional picketing at the jobsite. In many instances, because these members maintained steady workforces and generally only bid on construction work in a relatively small geographical area, their duty to bargain with the successful union continued to exist even if the job on which they were originally organized ended.

In addition, publicity picketing under section 8(b)(7)(C) of the NLRA, 29 U.S.C. § 158(b)(7)(C), to protect area standard wages and working conditions, often results in union acquisition of an agreement from the open shop contractor to guarantee these standards to his employees. This technique of protecting local wages and working conditions is particularly effective on mixed jobsites where nonunion and union contractors are both employed. The union knows that all picket lines, even legal publicity picket lines, inherently encourage union members on the mixed jobsite to engage in work stoppages or slow-downs in sympathy with the picketing union. The open shop contractor, operating as a subcontractor on a mixed jobsite, is in turn, aware of the impact a properly conducted publicity picket line has on a union general contractor. The open shop contractor is therefore under tremendous pressure to placate the picketing union by agreeing to pay the area/union wage standard to his employees. The advantage of publicity picketing is that it is exempt from the restrictions imposed on recognitional picketing by Section 8(b)(7) of the Act. Because a properly conducted publicity picket line can be maintained indefinitely, it affords unions the weapon they need to achieve most of their legitimate labor goals. Federal law also protects "prevailing" area wages and benefits on all federally funded or federally assisted construction projects.[5] In most cases "prevailing" is synonomous with the union scale of wages and benefits.

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[5] Davis-Bacon Act, 40 U.S.C. § 276(a). Most states have enacted "little" Davis-Bacon Acts that protect prevailing wages and benefits on state funded or assisted construction projects.

In combination with work preservation clauses and union standards clauses, the primary picketing allowed under the National Labor Relations Act provides ample protection for construction unions to protect the community of interests of their members. To add to these the right to picket for union signatory subcontracting clauses, that do not serve to eliminate shoulder-shoulder jobsite friction between union and nonunion employees,[6] but rather provide the union with a brutal top-down organizing weapon, will give craft unions exclusive control over all construction work within their jurisdictions and further serve to deprive nonunion employees of the freedom to choose their own bargaining representatives.

As stated above, over eighty-five percent of all ABC members, on occasion, work with union firms and three-fourths of ABC members award up to thirty percent of their subcontracts to union firms.

The foreseeable consequence of this Court's sanctioning of union signatory subcontracting clauses, that are not aimed at preventing jobsite friction, is to eliminate the longstanding historical practice of mixed construction jobsites and to exclude competition based on efficiency of operation, the evil castigated by this Court in *Connell*. Such a signal sent forth by this Court would sound the death knell for the open shop contractor in an already depressed economy.

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[6] The *amicus* agrees with the position of Petitioners that section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), was intended to allow only voluntary pre-hire agreements in the construction industry and that picketing to force employers to enter into 8(f) contracts, containing union signatory subcontracting clauses, is illegal conduct that this Court should proscribe.

CONCLUSION

For the reasons stated above, as well as those presented by Petitioners, the Associated Builders and Contractors urges this Court to reverse the below decision of the en banc Court of Appeals.

Respectfully submitted,

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Nos. 80-1798, 80-1808 and 81-

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BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

Introduction

This brief on behalf of the Chamber of Commerce of the United States of America, as amicus curiae, is filed with the written consent of the parties pursuant to Rule 36.2 of this Court. It is in support of the petitioners, Woelke & Romero Framing, Inc. (hereinafter "Woelke & Romero") and Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. (hereinafter "Pacific Northwest"), jointly referred to hereinafter as petitioners.

Interest of the *Amicus Curiae*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 2,600 state and local Chambers of Commerce, 1,200 trade and professional associations, and a direct business membership in excess of 75,600. It is the largest association of business and professional organizations in the United States. The Chamber regularly represents the interests of its member-employers in important labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

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[1] E.g., *Carbon Fuel Co.* v. *United Mine Workers,* 444 U.S. 212 (1979); *New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519 (1979); *N.L.R.B.* v. *Enterprise Association, etc.,* 429 U.S. 507 (1977); *Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.*

(Footnote continued on following page)

The questions presented by the instant case are of vital concern to the Chamber and its members. The Chamber participated in the litigation of these cases before the National Labor Relations Board and the United States Court of Appeals for the Ninth Circuit as an amicus.

One of the questions squarely presented is whether a labor organization may lawfully picket or strike to obtain a subcontracting clause under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. Section 158(e). The Chamber regards this issue as the most significant construction industry question to come before this Court since the 1959 amendments to the Act. In the Chamber's view, it goes to the very core of permissible "hot cargo" relationships.

In *Connell*, this Court acknowledged Connell's contention that the construction industry proviso authorizes *only voluntary agreements*. However, because the Court found the agreement there was outside the context of a collective bargaining relationship, the Court found it unnecessary to consider this contention, leaving the issue for resolution in another setting. *Connell Construction Co., Inc.* v.

(Footnote continued from preceding page)

v. *Plumbers and Steamfitters Local Union 100*, 421 U.S. 616 (1975); *Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 368 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.*, 417 U.S. 12 (1974); *Alexander* v. *Gardner-Denver* Co., 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkel, et al.*, 416 U.S. 115 (1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Plumbers & Steamfitters Local 100, 421 U.S. 616, 634, n.14. Thus, this is the first time since the 1959 amendments that the Court has had the opportunity to address this question—despite the fact that the current law, as enforced by the NLRB and circuits, in our view, overturns *Sand Door*.[2] Therefore, the Chamber shall focus this entire brief upon this single issue.[3]

Summary of Argument

Petitioners and amicus maintain that the construction industry proviso to Section 8(e) permits only *voluntary* agreements entered into within the context of a collective bargaining relationship. That position is supported by Board decisions and the decisions of this Court prior to 1959, the legislative history of Section 8(e), and its initial construction by a unanimous five-member National Labor Relations Board in numerous cases after 1959.

The principles enunciated by this Court in *Denver Building Trades*[4] and *Sand Door* lie at the very core of the Chamber's position. These principles and those established in other pre-1959 authorities were not disturbed by the 1959 amendments. *Therefore, construction industry unions gained no greater rights by the enactment of the proviso to Section 8(e) than they enjoyed prior thereto.*

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[2] *Carpenters Local 1976* v. *N.L.R.B.* (*Sand Door*), 357 U.S. 93 (1958).

[3] Amicus adopts and supports the briefs of petitioners Woelke & Romero and Pacific Northwest with regard to all other issues.

[4] *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

What was unlawful then (coercion to obtain a "hot cargo" clause) is unlawful now. It was necessary to include the proviso to Section 8(e) because, standing alone, Section 8(e) would have abolished such pre-existing rights. *In sum, the rights that construction unions enjoyed prior to the 1959 amendments were saved from extinction by the proviso, not expanded.*

The National Labor Relations Board adopted this view in a long line of cases after the 1959 amendments, beginning with *Construction, Production & Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part, 323 F.2d 422 (9th Cir. 1963). However, following the rejection of its views by some circuit courts, in 1964 the Board reversed its long-standing position. *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964). That decision has spawned and opened the floodgates to "top down" organizing efforts condemned by this Court in *Connell* and has nullified the teachings of *Sand Door.*

The instant cases provide the Court with an opportunity to restore the law to its proper course, consistent with prior precedent and congressional intent.

ARGUMENT

The construction industry proviso to Section 8(e) permits only those hot cargo agreements which have been voluntarily entered within the context of an existing collective bargaining relationship.

A. The law prior to the 1959 Amendments.

Prior to the 1959 amendments and the enactment of Section 8(e), it was well established that a union could not strike to obtain a "hot cargo" subcontractor clause without violating the secondary boycott provisions of the Act. Local 47, Teamsters Union (*Texas Industries, Inc.*), 112 NLRB 923, enforced, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council,* 123 NLRB 484, enforced, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons & Plasterers International Union (Selby-Battersby & Co.),* 125 NLRB 1179 (1959).

This Court's decision in *Sand Door* remains the cornerstone of that principle. In that case, Justice Frankfurter, speaking for the Court, said that a union is free to approach an employer to persuade him to sign a "hot cargo" clause *voluntarily,* and thus, to engage in a boycott, so long as the union refrains from coercion. Therefore, while recognizing that prior to the enactment of Section 8(e), in 1959, a labor organization and an employer could voluntarily enter into a "hot cargo" agreement, this Court nevertheless held that such a contract could not be enforced by coercive means specifically prohibited by Section 8(b)(4)(B), formerly Section 8(b)(4)(A) of the NLRA.

Presaging the principles involved herein, Justice Frankfurter observed:

> "A more important consideration, . . . is the possibility that the contractual provision itself may well

not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U.S. 93, 106.

Significantly, the dissent of Justice Douglas in *Sand Door*, which was joined by Chief Justice Warren and Justice Black and which would have permitted enforcement of such a provision by coercion, was based upon the reasoning that if the clause was the product of *voluntary collective bargaining*, it should be enforceable just as any other provision of a collective bargaining agreement. Said Justice Douglas:

> "That provision was bargained for like every other clause in the collective agreement. It was agreed to by the employer. How important it may have been to the parties—how high or low in their scale of values—we do not know. But on these records *it was the product of bargaining, not of coercion.*" 357 U.S. at 112. (Emphasis added.)

And later he added:

> "Certain it is that where he *voluntarily agrees* to the 'unfair' goods clause he is not forced or coerced in the statutory sense." 357 U.S. at 113-114. (Emphasis added.)

Accordingly, it is manifestly clear that before 1959 "hot cargo" agreements could only be obtained *voluntarily and in an atmosphere free from coercion.*

In its brief in opposition to the petition in *Woelke & Romero,* the Board (with only passing mention of *Sand Door*) took issue with the Chamber's contention that prior to the 1959 amendments Board decisional law did not permit picketing or a strike to obtain a "hot cargo" agreement.[5] It will undoubtedly take the same position here. The Board's contentions rest upon an artificial distinction between a "hot cargo" agreement directed at disrupting what it chooses to call ongoing or existing business relationships and an agreement directed at future relationships. In support of that position, the General Counsel relies upon a footnote in the Board's *Texas Industries* decision, in which it declined to decide whether the Union's picketing violated Section 8(b)(4)(A)[6] insofar as it was directed to future dealings between the general contractor and such subcontractors as might, in the future, refuse to meet the union's wage standards. *Local 47, Teamsters Union (Texas Industries, Inc.),* 112 NLRB 923, 925, n. 2 (1955), enforced, 234 F.2d 296 (5th Cir. 1956). However, the General Counsel neglected to point out that the Board later addressed this very question in 1959, when it decided *Bricklayers, Masons & Plasterers International Union (Selby-Battersby),* 125 NLRB 1179 (1959). In that case, Selby, a construction subcontractor-distributor, was struck by constituent locals of the Baltimore Building & Construction Trades Council because Selby refused to incorporate a "hot cargo" agreement in its contract with those locals.

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[5] See the Board's brief in opposition to petitions for certiorari, pages 12-13.

[6] Now Section 8(b)(4)(B).

The "hot cargo" agreement, if accepted by Selby, would have permitted the completion of any jobs underway by non-signatory open shop contractors with whom Selby had existing contracts. However, the "hot cargo" agreement precluded Selby from doing business with any non-signatory open shop contractor at a *future time.* The Board held:

> "As found by the Trial Examiner, the fact that the Standard Agreement permitted the completion of nonunion jobs already underway, and thus [only] sought to disrupt secondary relationships *at a future time, does not detract from or bar a finding of unlawful object under Section 8(b)(4)(A).* The impact of the strike was nevertheless immediate, and there is no question but that the open-shop general contractors, with whom Selby was pressured by the strike to cease doing business, constituted a well-defined identifiable group." (Emphasis added.) 125 NLRB at 1182.

The Board then proceeded to issue an Order, providing that the Building & Construction Trades Council cease and desist from engaging in secondary activity with an object of forcing or requiring Selby-Battersby or any other employer:

> ". . . to cease doing business with Frederick Construction Company, Garden Construction Corporation, members of Associated Builders and Contractors of Maryland, Incorporated, or any other open-shop contractors engaged in commercial, institutional, or industrial construction in Baltimore, Maryland, and vicinity; . . ." 125 NLRB at 1185.

By only the broadest stretch of the imagination could a group that includes *any* open shop contractor in Balti-

more, Maryland and vicinity be characterized, as has been done in the Board's brief, as including only entities in an "ongoing business relationship" with Selby. Clearly, the Board's Order encompassed and extended its protection to companies with whom Selby may never have had a prior business relationship, and which indeed may never have previously done business in the Baltimore area before entering an agreement with Selby for the first time. This is as much a future relationship as one could imagine. For the Board to call such a relationship an "ongoing or existing relationship" of any type does a disservice to the law and the Board's mission.

Section 8(f) was enacted to permit a contractor who had never done business in a particular area to enter into a prehire agreement with building trade unions in that area, in order to permit that contractor to bid with known costs and to draw from the readily available pool of local labor. Thus, Congress recognized that modern day contractors move rapidly about the country, performing work in areas where they previously may not have been engaged. Considering that Congressional accommodation, it is ludicrous to say that Selby could be foreclosed from doing business with such a company because it does not have an "ongoing business relationship" with that particular contractor or subcontractor. Stated differently, the descriptive language used in the Board Order does not refer to an ongoing relationship at all and cannot be given the restrictive interpretation currently urged by the Board in its brief. The Board's Order in *Selby* simply stated *that the Union cannot resort to coercive activity to prevent a future relationship (any future relationship) with a contractor active in Baltimore, Maryland and vicinity.*

The absurdity of the Board's position is evident from the following example. A national company such as Foster Wheeler Corporation or the Bechtel Corporation performs work throughout the United States. Therefore, if we were to substitute the name of such a firm for Selby-Battersby, would the Board assert that the prohibition of secondary activity against any subcontractor in the entire country (as such an Order would necessarily require), constitutes a readily identifiable group with whom the general contractor has an "ongoing business relationship". Obviously not! Therefore, it bears repeating that the Board's Order in Selby-Battersby makes no reference whatsoever to an ongoing business relationship and prohibits secondary coercive activity against *any* contractor active (or who should become active) in Baltimore, Maryland and vicinity. To say that it reads otherwise is absurd.

Thus, it is abundantly clear that the issue that the Board did not have to meet head-on in 1955, when it decided *Texas Industries,* was decided in *Selby-Battersby* in 1959. Thus, in the very words of the Board, the fact that the picketing ". . . sought to disrupt secondary relationships at a future time [did] not detract from or bar a finding of unlawful object under Section 8(b)(4)(A)".

Selby-Battersby clearly supports the position of the petitioners and the Chamber, that prior to the 1959 amendments strike pressure to obtain a "hot cargo" clause violated the secondary boycott provisions of the Act. Moreover, Congressional intent establishes that such pressure would continue to be unlawful following enactment of the amendments.

B. The legislative history of Section 8(e) and the construction industry proviso.

Section 8(e) outlawed all "hot cargo" agreements *even if voluntary in nature,* with two exceptions—the first, a sweeping exemption for the garment industry, exempting that industry from the prohibitions of both Section 8(e) and Section 8(b)(4)(B); the second, a more limited exception for the construction industry, permitting such voluntary agreements when applicable to work to be performed at the site of the construction and retaining the Section 8(b)(4) bar against coercive enforcement. *Therefore, building construction unions came away from the 1959 Congressional action as to this issue (the right to strike to obtain an 8(e) agreement) in exactly the same position they were in prior to those enactments.* They were saved from the outright ban of Section 8(e), but they neither gained nor lost protection. Congress, taking a photograph of the law as it then existed, simply preserved to labor organizations in the construction industry the same rights which they enjoyed under *Sand Door* and prior court and Board decisions preceding the enactment of Section 8(e). Then Senator John F. Kennedy specifically addressed this subject in the Congressional debates. He said:

> *"Since the [8(e)] provision does not relate to Section 8(b)(4) . . .*
>
> *It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract."* (Emphasis added.) II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, 1433.

Senator Kennedy further stated:

> "The first proviso under new section 8(e) of the National Labor Relations Act is *intended to preserve the present state of the law* with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project." (Emphasis added.) II Legislative History of Labor-Management Reporting & Disclosure Act of 1959, 1433.

Additionally, Representative Barden, Chairman of the House Labor Committee and a member of the Conference Committee, who presented the Conference Report to the House, stated that the first proviso to Section 8(e) would permit the making of *voluntary* agreements relating to contracting and subcontracting work to be done at a construction site. Congressman Barden said:

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." (Emphasis added.) II Legislative History of Labor-Management Reporting & Disclosure Act of 1959, 1715.

Senator Kennedy was also careful to point out that the proviso did not change the law as enunciated by this Court in *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675 (1951):

> "This proviso affects only Section 8(e), and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* (341

U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force." II Legislative History of the Labor-Management Reporting & Disclosure Act of 1959, 1433.

The special treatment accorded the construction industry by the proviso to Section 8(e)—authorization to *voluntarily* enter into "hot cargo" agreements is comparable in nature to the special treatment of that industry conferred elsewhere in the amended Act. By the new Section 8(f), Congress likewise gave recognition to the special circumstances pertaining in the industry differentiating it from manufacturing and sales enterprises. Section 8(f) permits construction unions and employers to enter into *voluntary* prehire collective bargaining agreements and to make the union-security provisions of their contracts effective after only 7 days, practices which would otherwise constitute employer violations of Section 8(a)(1), (2) and (3) and union violations of Section 8(b)(1)(A) and (2). As the legislative history makes clear, Congress did not intend by Section 8(f) to legitimize strikes or picketing to coerce an employer's acceptance of these agreements.[7]

Is it at all logical to assume that the same Congress which carefully drafted Section 8(f), creating unusual new rights and protecting these rights against abuse by prohibiting coercion to obtain them in a primary setting,

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[7] H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. p. 42, I Leg. Hist. 946 (1959) ("Nothing in [8(f) is intended * * * to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such prehire agreements."); II Leg. Hist. 1715 (1959); cf. *Sperry* v. *Plumbers Local 562*, 210 F.Supp. 743, 747-748 (W.D.Mo. 1962) (holding that Section 8(f) provides no defense to an 8(b)(7)(C) charge); *N.L.R.B.* v. *Int'l Hod Carriers Union, Local 1140*, 285 F.2d 397, 403 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961).

would nevertheless allow coercion in an admittedly secondary situation? There is not one word of legislative history to support such a contention!

The legislative history of the 1959 amendments makes it clear beyond doubt that the status of the law was to be retained. Justice Brennan writing for the majority in *National Woodwork* buttresses this position by observing that "[P]rovisos were added to Section 8(e) to preserve the *status quo* in the construction industry and exempt the garment industry from the prohibitions of Section 8(e).[8]

Consequently, the issue of whether coercive conduct may be utilized in seeking a "hot cargo" clause, is one of novel impression before this Court and presents the opportunity to cure the Board's error in the reversal of its unanimous decision in *Construction, Production and Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), rev'd in part, 323 F.2d 422 (9th Cir. 1963).

Denver Building Trades and *Moore Drydock*[9] retain their validity and are today the cornerstone of other major construction labor law concepts. See *N.L.R.B.* v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975); *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.*, 366 U.S. 667 (1961). The rule of each of these cases, recognizing the separate interests of each contractor and its employees on a construction project, would be very seriously eroded and eventually eradicated if unions in the construction industry were permitted to continue to *coercively* obtain agree-

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[8] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 637 (1967).

[9] *Sailors Union of the Pacific*, 92 NLRB 547 (1950).

ments of the type at issue here, which would apply across craft lines and at all future jobsites of the employer. Surely, if the Court sanctions the current state of the law, construction unions will have taken a giant step forward toward the achievement of those common situs objectives so long denied to them by Congress.[10]

C. The status of the law after the 1959 Amendments.

Subsequent to the 1959 amendments, *a unanimous five-member Board* in *Construction, Production and Maintenance Laborers Local 383 (Colson & Stevens)*, 137 NLRB 1650 (1962), reversed in part, 323 F.2d 422 (9th Cir. 1963), held that it was unlawful to strike to obtain a subcontracting clause, even where such clause, if voluntarily entered, would be protected by the construction industry proviso. The Board followed that ruling in a long line of cases, including:

Local 825, Operating Engineers (Building Contractors Association of New Jersey), 145 NLRB 952 (1964).

Local 300, Hodcarriers Union (Fiesta Pools, Inc.), 145 NLRB 911 (1964).

Los Angeles Building Trades Council (Treasure Homes), 145 NLRB 279 (1963).

Southern Calif. District of Laborers (Swimming Pool Gunite Contractors), 144 NLRB 978 (1963).

Los Angeles Building and Construction Trades Council (Stockton Plumbing Co.), 144 NLRB 49 (1963).

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[10] See, for example, H.R. 9070, H.R. 9089, H.R. 9373, and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); H.R. 7438 (92nd Congress); and H.R. 4726 (93rd Congress, 1973).

Essex County and Vicinity District Council of Carpenters, 141 NLRB 858 (1963).

Los Angeles Building & Construction Trades Council (Interstate Employers, Inc.), 140 NLRB 1249 (1963).

Operating Engineers Union (Sherwood Construction Co.), 140 NLRB 1175 (1963).

Building and Construction Trades Council of Orange County (Sullivan Electric Company), 140 NLRB 946 (1963).

Local Union 825, Operating Engineers (Nichols Electric Company), 140 NLRB 458 (1963).

Building and Construction Trades Council of San Bernardino, etc. (Gordon Fields), 139 NLRB 236 (1962).

Local 60, United Association of the Plumbing & Pipefitting Industry (Binnings Construction Co., Inc.), 138 NLRB 1282 (1962).

Because some circuits rejected that view, in *Northeastern Indiana Building & Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854 (1964), the Board reversed its position.[11] We submit, however, that the Board

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[11] *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1963); *Essex County & Vicinity District Council of Carpenters & Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N.L.R.B.*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N.L.R.B.*, 328 F.2d 534 (D.C.Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al.* v. *N.L.R.B.*, 328 F.2d 540 (D.C.Cir. 1964). See also, *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Unfortunately, at the time these circuit court cases were decided, the charging

(Footnote continued on following page)

correctly construed the statute in *Colson & Stevens* and that its subsequent reversal was in error.

It cannot be overemphasized that the five-member Board that unanimously decided *Colson & Stevens* (the so-called "Kennedy Board") is the very same Board that in less than one year departed from precedent favorable to management in thirteen cases, in some instances recalling decisions for reconsideration and ultimate reversal.[12] *Nevertheless, that same Board was of one mind in holding that only those "hot cargo" agreements which are the product of voluntary action are lawful under Section 8(e).* (Citing as an example of pre-1959 law: *Local 47, Teamsters*

(Footnote continued from preceding page)

party in a labor board proceeding was not considered a party for the purposes of review in the circuit courts, but merely an amicus curiae. Thus, if the Board chose not to seek certiorari, there was nothing the charging party could do on its own initiative. Not until the decision of this Court in *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), was that situation corrected and the charging party granted standing to intervene in courts of appeals proceedings for the review or enforcement of labor board orders; and having intervened, to enjoy the status of a party with the right to seek certiorari independent of the Board. Thus, by the time *Scofield* was decided, no complaint would issue on this subject by the Board. Hence, there was no issue which could be litigated. It was literally bottled up until these post-*Connell* cases.

[12] See address by then Board member and former chairman, Boyd Leedom, before the Labor Law Section of the Illinois State Bar Association, January 19, 1962, and cases cited therein. (49 LRRM 84, 85) Member Leedom stated: "I have made an informal statistical survey of the decisions issued since April 14, 1961, the day that President Kennedy made his latest appointment to the Board. According to my figures, there has been departure from precedent in thirteen cases."

Union (Texas Industries, Inc.), 112 NLRB 923, enforced, 234 F.2d 296 (5th Cir. 1956); *Bangor Building Trades Council, AFL-CIO (Davison Construction Company, Inc.)*, 123 NLRB 484, enforced, 278 F.2d 287 (1st Cir. 1960); *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO, et al (Selby-Battersby & Company)*, 125 NLRB 1179 (1959).

In *Colson & Stevens*, the Board extensively reviewed the legislative history of the 1959 amendments and concluded that this history ". . . makes it manifest that Congress did not intend to change existing law with respect to the legality of picketing to obtain and enforce agreements of the type . . ." here involved. 137 NLRB at 1651. The Board found that proposition explicit in *Sand Door*.

> "If, as there [in *Sand Door*], an agreement to require subcontractors to observe union standards, though legal, was not a defense to a charge of violating Section 8(b)(4)(A) by strikes or picketing, coercive pressure of a strike or picketing to obtain such an agreement would appear equally unlawful. In both situations the evil sought to be remedied is the cessation of business relationships by proscribed tactics." 137 N.L.R.B. at 1651.

Then, quoting Representative Barden's statement that the proviso would permit "voluntary agreements" and Senator Kennedy's statement that the Section 8(e) proviso was not intended to change the law with respect to the judicial enforcement of contracts excepted by the proviso, or *with respect to the legality of a strike to obtain such a contract*, the Board concluded:

> "Reading Section 8(e) together with section 8(b)(4)(A) in the light of the aforementioned statements by Senator Kennedy and Representative Barden, we conclude that the construction exemption in Section 8(e) was not intended to remove from the reach of Section 8(b)(4) picketing and other proscribed conduct which is designed to secure such contracts as are before us in this case. Under all the circumstances of this case, and particularly in view of our holdings in similar cases decided under Section 8(b)(4)(A) of the Act before the 1959 amendments, the retention of that section's language in the present Section 8(b)(4)(B), as explained above, and the strongly declared congressional purpose to prohibit the use of secondary pressure and economic force by unions to secure an objective such as Respondents sought by its picketing herein, we must find that Respondents' picketing of Colson violated Section 8(b)(4)(i) and (ii)(A) and (B) of the Act." 137 N.L.R.B. at 1652.

It is simply illogical to assume that the same Congress, which carefully drafted Section 8(f) of the Act[18] so as to prohibit coercion to obtain a pre-hire agreement from a primary employer, would allow coercion to obtain a protected "hot cargo" agreement in an admittedly secondary context. Furthermore, it makes no sense whatsoever to permit a union to shut down construction over a broad area, possibly covering many states and hundreds of sites disrupting the flow of commerce, valued perhaps in the billions of dollars, in an effort to *obtain* an 8(e) clause, while prohibiting that same union from striking one single job no matter how small to *enforce* the clause

[18] 29 U.S.C. Section 158(f).

once obtained. As the Board in *Colson & Stevens* convincingly stated:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective. The Supreme Court periodically reminds us of the familiar principle of statutory construction that words used in a statute should not be literally construed, even where their literary purport is clear, *if such construction would lead to absurd and incongruous results plainly at variance with the policies of the legislation as a whole. United States* v. *American Trucking Association,* 310 U.S. 534, 542-543; *Ozawa* v. *United States,* 260 U.S. 178, 194." (emphasis added) 137 NLRB at 1652, n. 7

In the instant cases, the Court has the opportunity to answer the question left unanswered in *Connell* and to restore the law to the congressional design and purpose so clearly mirrored in the legislative history of the 1959 amendments.

By permitting building trade unions to extract subcontracting agreements by coercive means, the Board and the circuit courts have overruled *Sand Door* and permitted massive unchecked secondary activity that runs counter to all the concerns and principles that are the underpinnings to *Denver Building Trades*[14], *General Elec-*

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[14] *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675 (1951).

tric,[15] *National Woodwork,*[16] and *Enterprise.*[17] This errant state of the law has fomented the problems which gave birth to *Connell* and its progeny.

Agreements such as would be permitted by the opinion of the court below tend to restrain competition in the nation's largest industry. Construction employers also find themselves thrust into potential antitrust settings in an effort to carry on their business without disruption. Thus, the opinion below cuts across the grain of construction labor law by fostering disruptions in an industry where common situs principles, the reserved gate doctrine, procedures for the resolution of jurisdictional disputes and the congressional authorization of prehire agreements, have all been developed to lessen friction and avoid stoppages. The thrust of each of these concepts is the protection of secondary parties. Once again, they must be reaffirmed.

Sand Door concepts, the legislative history of Section 8(e), and the unanimous postion of the so-called Kennedy Board during the 1959-1964 period all chart a clear path toward a return of the rule of *Colson & Stevens,* namely, that only voluntary "hot cargo" agreements are permitted by the construction industry proviso to Section 8(e) of the Act.

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[15] *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *N.L.R.B.,* 366 U.S. 667 (1961).

[16] *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.,* 386 U.S. 612 (1967).

[17] *N.L.R.B.* v. *Enterprise Association, etc.,* 429 U.S. 507 (1977).

CONCLUSION

For all of the foregoing reasons and based upon the record as a whole, the Court is urged to reverse the decision of the Ninth Circuit in these cases, and to expressly hold that the construction industry proviso to Section 8(e) permits only voluntary "hot cargo" agreements.

Respectfully submitted,

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Nos. 80-1798, 80-1808, 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF GEORGIA POWER COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF AMICUS CURIAE OF GEORGIA POWER COMPANY IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF GEORGIA POWER COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Georgia Power Company hereby respectfully moves for leave to file the attached brief amicus curiae in support of the Respondents in these three consolidated cases. The consent of the attorneys for the Respondents, the National Labor Relations Board; Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, has been obtained. The consent of the attorney for the Petitioner in No. 80-1808, Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., has been obtained. The consent of the attorneys for the Petitioners in Nos. 80-1798 and 81-91, Woelke & Romero Framing, Inc. and Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., was requested but has been refused.

The interest of Georgia Power Company in these consolidated cases results from its status as the defendant in an action currently pending in the United States District Court for the Southern District of Georgia in which the plaintiff has alleged that Georgia Power Company violated the federal antitrust laws by conspiring with local construction trade unions in the Augusta, Georgia area to exclude non-union contractors from working on the construction of a generating plant being built by Georgia Power Company near Augusta, Georgia. One of the defenses raised by Georgia Power Company to that action is that the agreement, if any exists, between it and the construction trade unions to exclude non-union contractors from the generating plant construction project is lawful under the "construction industry proviso" to Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and therefore exempt from the application of the antitrust laws. To the extent that the Court's decision in these cases determines the scope of the construction industry proviso and delineates the policies underlying its enactment by Congress, it will impact upon the defenses raised by Georgia Power Com-

pany in the action pending against it in the Southern District of Georgia.

In the cases before the Court, the Petitioners are a contractor and two associations of contractors. Their interests and the interests of the Respondents differ markedly from those of Georgia Power Company, which not only acts as a general contractor in the construction of multi-billion dollar electric generating facilities, but also is a purchaser of hundreds of millions of dollars of construction services annually in the form of electric generating facilities, office buildings, and other commercial facilities. As both a general contractor and a purchaser of construction services, Georgia Power Company has a great interest in obtaining construction services at the most economical cost and in promoting construction trade unions, which provide a source of the large number of skilled craftsmen necessary to complete construction of an extremely large construction project such as an electric generating facility. Thus Georgia Power Company can provide the Court with a different viewpoint of the issues presented by these appeals from that of either the Petitioners or the Respondents.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF GEORGIA POWER COMPANY IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Georgia Power Company is an electric utility company that provides electricity to approximately one million two hundred thousand customers throughout the State of Georgia. Georgia Power's interest in these cases before the Court on writ of certiorari results from its status as a purchaser of construction services and as the owner of and general contractor for two electric generating plants under construction in Georgia, each of which has an estimated cost of approximately five billion dollars. Also, Georgia Power Company is the defendant in an action pending in the United States District Court for the Southern District of Georgia in which the scope of the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e), will be an issue.

Georgia Power Company is undoubtedly one of the largest non-governmental purchasers of construction services in the State of Georgia. During 1981 Georgia Power budgeted over six hundred and fifty million dollars ($650,000,000.00) to be spent on the construction of new generating facilities. The two largest projects that Georgia Power currently has under construction are Plant Scherer, a fossil-fuel powered electric generating plant being constructed in Monroe County, Georgia, and Plant Vogtle, a nuclear-powered generating plant being built in Burke County, Georgia. The estimated cost of each of these two generating facilities is approximately five billion dollars ($5,000,000,000.00).

With regard to each of these two construction projects Georgia Power Company will be a partial owner of the completed generating plant and is acting as the general contractor on each project. Its construction department determines how the work to be performed on each project is divided up, develops and implements schedules for the completion of the work, evaluates and selects contractors to perform the various jobs on each project, and provides

management coordination at the job site. With regard to Plant Vogtle alone, Georgia Power Company has contracted with approximately fifty contractors to complete construction of various buildings or other portions of the Plant Vogtle project. Georgia Power monitors and inspects the work performed by the contractors and subcontractors employed by it, purchases materials and equipment to be used by the contractors and subcontractors, assists in training skilled craftsmen, coordinates labor relations between the construction project and local unions, monitors workers' productivity, and implements safety programs. To carry out the numerous functions performed by Georgia Power Company in building generating facilities, the construction department currently employs over 1,100 persons, almost all of whom are located at the two generating plant construction sites.

Both Plant Vogtle and Plant Scherer are being constructed using union workers pursuant to "project agreements" negotiated by Georgia Power Company with the local trade unions. Georgia Power negotiated a separate agreement with different local unions with respect to each plant although the terms of the two agreements are similar. Both project agreements require that all workers employed by Georgia Power, its contractors, and their subcontractors be obtained by referral from the hiring halls maintained by the local construction trade unions and provide that wages and fringe benefits for such workers be determined by the collective bargaining agreements entered into by the local unions and the area contractors' associations with certain limitations. Each of the two project agreements applies only to the construction of a single generating plant. Although the project agreements do not require the exclusion of non-union contractors, Georgia Power has unilaterally determined that it will not award work on the projects to any contractor who cannot show that he has reached an agreement with the local trade unions having

jurisdiction over the particular project to refer workers to him.

In February of 1981, Georgia Power Company was named as the defendant in an action filed in the United States District Court for the Southern District of Georgia by a non-union contractor who had submitted a bid for the construction of the administration building at Plant Vogtle and had not been awarded the contract. The contractor alleged that Georgia Power Company had violated Section 1 of the Sherman Act, 15 U.S.C.A. § 1, by entering into a conspiracy and agreement with the Augusta Building and Trades Council to exclude non-union contractors from the Plant Vogtle project.

One of the defenses raised by Georgia Power Company to that action is that an agreement, if any exists, between it and the Augusta Building and Trades Council to exclude non-union contractors from Plant Vogtle is lawful under the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e), and is therefore exempt from the application of the federal antitrust laws. To the extent that this Court in resolving these cases determines the scope of the construction industry proviso and delineates the policies underlying its enactment, that determination will affect the ability of Georgia Power to defend against the antitrust action currently pending against it in the Southern District of Georgia.

Georgia Power believes that by entering into the project agreements with respect to Plant Vogtle and Plant Scherer with the construction trades local unions having jurisdiction over each plant site, it has achieved a substantial cost savings in the construction of those two generating plants and has secured a source of the large number of skilled workers required to complete each project. This Court's determination of the scope of the construction industry proviso to Section 8(e) could potentially affect the legality and usefulness of those project agreements in light of the pending antitrust action against Georgia Power Company.

For these reasons, Georgia Power Company is filing this brief amicus curiae in support of the interpretation of Section 8(e) advocated by the Respondents in these cases. This brief amicus curiae is filed with the consent of all of the Respondents and of the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Petitioner in case number 80-1808. The consent of the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. and of Woelke & Romero Framing, Inc., Petitioners in cases 81-91 and 80-1798, has been requested but was refused.

SUMMARY OF ARGUMENT

The restrictive subcontracting agreements at issue in these cases fall within the literal language of the construction industry proviso to Section 8(e) and also facilitate the purposes for which Congress enacted the construction industry proviso and the other sections of the 1959 Landrum-Griffin Act that facilitate the organizational efforts of unions in the construction industry. Therefore the interpretation of Section 8(e) adopted by the National Labor Relations Board should be affirmed by this Court and the order of the Board enforced.

ARGUMENT

The only issue presented by these three cases that Georgia Power intends to address in this brief amicus curiae is the scope of the construction industry proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C.A. § 158(e). The Petitioners contend that the proviso does not encompass agreements that restrict subcontracting to unionized subcontractors, even if the agreement is made in the context of a collective bargaining relationship, where the agreement is not limited to a particular job site on which workers represented by the union that signed the agreement will be employed at some point or where the subcontracting clause requires that subcontractors be signatories to an agreement with a specific union. The National Labor Relations Board found the restrictive subcontracting clauses at issue to be valid under the construction industry proviso to Section 8(e), because they were entered into by parties in a collective bargaining relationship. Georgia Power Company supports the interpretation of Section 8(e) advocated by the National Labor Relations Board.

I. The Ninth Circuit's Determination That the Subcontracting Clauses Being Challenged by the Petitioners are Lawful Under the Construction Industry Proviso of Section 8(e) Should Be Affirmed.

Georgia Power Company believes that the en banc court of the Ninth Circuit correctly determined in *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 654 F.2d 1301, *cert. granted*, —— U.S. —— (1981), that subcontracting agreements that are not limited to a single job site, that apply regardless of whether the contractor employed union members on the job, and that require the subcontractor to have a bargaining agreement with a particular union are within the scope of the protection accorded to restrictive subcontracting agreements between a union and an employer in the construction industry by the first

proviso to Section 8(e) of the National Labor Relations Act. The opinion of the Ninth Circuit and the decision of the District of Columbia Circuit in *Donald Schriver, Inc. v. N.L.R.B.*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981), which enforced the Board's decision in a companion case to the ones before this Court, present the legal reasoning supporting the decision reached by the Ninth Circuit in a much more capable and detailed manner than can Georgia Power Company within the limitations of a brief amicus curiae. Georgia Power Company does wish, however, to focus briefly upon some of the policy considerations that support the decisions reached by the National Labor Relations Board and the en banc court of the Ninth Circuit.

The patterns of employment characteristic of the construction industry differ markedly from those of other industries. Generally construction projects are of limited duration and a variety of contractors and subcontractors, each with his own set of employees, will perform work at different stages during the course of a single project. Workers in the construction industry typically are not continuously employed by the same employer but work for many employers on successive jobs of short duration. With the exception of general laborers, workers in the construction industry are generally skilled craftsmen who perform only one particular type of construction work, such as carpentry or pipe fitting. Particularly on commercial construction projects, the skills of any one type of craftsman will be required only during one stage of the construction.

The typical pattern of employment in the construction industry and the resulting difficulties encountered by unions in attempting to organize workers in that industry for purposes of collective bargaining motivated in part the enactment by Congress in 1959 of the construction industry proviso to Section 8(e) and also of Section 8(f), which allows employers in the construc-

tion industry and unions representing workers employed in the construction industry to enter into agreements concerning terms and conditions of employment prior to the employees of that employer designating the union as their collective bargaining representative.

In addition to the difficulties encountered by unions in organizing workers, the pattern of employment in the construction industry creates problems for the contractors who must employ construction workers and the owners for whom the construction work is performed. Both the contractor and the owner must be able to make a reasonable estimate of the cost of obtaining labor on a construction project, the contractor so that he can make an accurate bid for the contract to perform the work and the owner so that he can evaluate the economic reasonableness of undertaking the construction project. The contractor must be able to obtain a sufficient number of skilled workers to perform the construction contract within the time constraints imposed by the owner or other contractor with whom he contracts.

Another significant characteristic of employment in the construction industry is that typically several employers will be working in close proximity on the same construction project. As a result, disputes between one employer and a union either representing or seeking to represent his employees can impact upon the entire construction project and the operations of all of the other employers on the project. Thus, a dispute between a subcontractor who is performing only a very minor function in the completion of the project can detrimentally affect the completion of the entire project.

These concerns, discussed here in the abstract, impact directly upon Georgia Power Company and motivated it to enter into the project agreements with the construction trade unions have jurisdiction over the Plant Scherer and Plant Vogtle projects. The project agreements insure that Georgia Power, as an owner of and the general contractor for each project, and its contractors and sub-

contractors, will have a sufficient number of skilled craftsmen available to complete construction of the generating plants in a timely fashion, even though neither project is located near a metropolitan area of any size. The project agreements also enable Georgia Power, both as owner and general contractor, to better estimate the cost of completing each plant by establishing wage rates and fringe benefit payments for the workers employed on the project. Because it was able to negotiate the elimination of certain benefits, such as travel pay and doubletime, normally received by union craftsmen under their local collective bargaining agreements, Georgia Power Company has obtained substantial cost savings in the completion of Plant Vogtle and Plant Scherer.

Restrictive subcontracting agreements of the type at issue in these cases also promote the same policies that prompted the enactment by Congress of the special provisions in the 1959 Landrum-Griffin Act that concern the construction industry. Such agreements benefit not only the unions representing workers employed in the construction industry but also the employers and purchasers of construction services. A subcontracting agreement that requires that any subcontractor with whom the employer contracts, regardless of the job site on which the subcontractor will work and regardless of whether any of the employer's employees represented by the union will be present at that site, serves to promote labor peace on the project and prevent strife resulting from union and non-union workers being present on the same construction site. Thus such subcontracting agreements protect the employers' interests as well as those of the unions.

The desire to prevent disruptions and delays in the completion of Plant Vogtle and Plant Scherer prompted Georgia Power to determine that it would not award contracts for work to any contractor who could not demonstrate that he had reached an agreement with the area

construction trade unions to refer workers to him pursuant to the applicable project agreement. While Georgia Power has not entered into an agreement with the unions to exclude non-union contractors, the practical effect is the same. By excluding non-union contractors, Georgia Power Company can avoid the extremely costly delays that can result when labor strife erupts on a project, even when only a small subcontractor is involved. In the context of the construction of a multi-billion dollar generating plant, even a short delay can be extremely costly both to the owner as a result of its use of the generating plant being delayed and to the contractors in terms of inability to complete work on schedule.

Subcontracting agreements such as those at issue in these cases also facilitate the unionization of the construction industry in a manner that is consistent with the purposes underlying the special provisions of the 1959 Landrum-Griffin Act that apply solely to the construction industry. While one of the goals of that legislation was to prevent "top-down" organizing by unions, another obvious goal was to ease some of the problems preventing collective bargaining by unions, which was one of the purposes of the National Labor Relations Act. By facilitating the organizational efforts of construction unions, such restrictive subcontracting agreements benefit employers in the construction industry by insuring the continuation and expansion of the union apprenticeship and training programs that produce the skilled craftsmen necessary to complete large commercial construction projects.

For these policy reasons, Georgia Power Company contends that restrictive subcontracting agreements such as those at issue in these cases should be protected by the construction industry proviso. Such agreements fall both within the literal language and the spirit of that proviso.

II. Issues Not Presented By These Cases.

The three consolidated cases before this Court on writ of certiorari to the Ninth Circuit all involve subcontracting agreements that were entered into in the context of a collective bargaining relationship. Georgia Power Company respectfully suggests that these cases do not present the Court with any issue concerning what subcontracting agreements between parties not in a collective bargaining relationship are permissible under the construction industry proviso to Section 8(e). Because the parties have not disputed the existence of a collective bargaining relationship in these cases, no issue arises concerning the extent to which a pre-hire agreement under Section 8(f) of the National Labor Relations Act, 29 U.S.C.A. § 158 (f), establishes a collective bargaining relationship between a union and an employer in the construction industry.

CONCLUSION

The particular characteristics of employment in the construction industry that prompted Congress to enact the construction industry proviso to Section 8(e) and to authorize pre-hire agreements under Section 8(f) of the National Labor Relations Act warrant the affirmation and enforcement of the National Labor Relations Board's decision that the clauses at issue in these cases, which were adopted by parties in a collective bargaining relationship, fall with the scope of permissible subcontracting agreements under the construction industry proviso to Section 8(e) of the National Labor Relations Act.

Respectfully submitted,

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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL No. 944, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL No. 235, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO,
Respondents,

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,

OREGON - COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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Respondents,

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

No. 81-91

OREGON - COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The approximately 120,000 members of the National Association of Home Builders ("NAHB") include representatives of every facet of residential construction, a $150 to $200 billion industry employing 3.5 million people. NAHB members construct 75 percent of all housing in the United States, including traditional single family homes, apartments, multifamily homes and condominiums.

NAHB has followed the progress of these and related cases[1] with great interest, because their outcome will greatly affect the business practices of its members and their choice of methods to achieve economic efficiency in home building.[2]

The membership of NAHB includes builders and subcontractors who employ both union and non-union labor. Both are critically affected by "union-signatory" subcontracting clauses[3] and by the use of economic coercion to

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[1] *Los Angeles Bldg. & Construction Trades Council (Donald Schriver, Inc.)*, 239 N.L.R.B. 264 (1978), *enforced, Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981); *Colorado Bldg. & Construction Trades Council (Utilities Service Engineering)*, 239 N.L.R.B. 253 (1978).

[2] Three of the employers involved in these cases and the closely related cases appealed to the D.C. Circuit Court of Appeals in which petitions for certiorari were denied (*Los Angeles Building & Construction Trades Council, supra* note 1) are residential builders or subcontractors to residential builders.

[3] The collective bargaining agreements in issue provide that the employer party may not subcontract work "to be done at the site of construction, alteration, painting or repair of a building, structure or other work" except to a firm having a labor agreement with the union party. *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)*, 239 N.L.R.B. 274 (1978), *aff'd Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1307-08 (9th Cir. 1981) (rehearing *en banc*). Such clauses, which purport to limit subcontracting to employers who are signatories to union contracts, are termed

obtain such clauses. As this Court noted in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 623-24 (1975), economic efficiency is not related to whether a subcontractor pays wages and fringe benefits equivalent to those established by an agreement negotiated with a building trades union. Union signatory subcontracting clauses, however, restrict an employer's freedom to choose with whom he does business without regard to whether the superior economic efficiency of subcontractors thereby excluded from the market is derived from paying less than union scale to their employees. These clauses create a privileged class of employers having union labor agreements who are insulated from competition from employers without such agreements. Broadening the permissable scope of such clauses beyond the original intent of Section 8(e),[4] as the Court of Appeals has done in these cases, therefore threatens

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"union signatory clauses." If entered into by construction industry employers they violate § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), unless they fall within the protection of the so-called "construction industry proviso" to § 8(e). *Los Angeles Bldg. & Construction Trades Council, supra* note 1, at 1304-06.

[4] Section 8(e), 29 U.S.C. § 158(e), was added as an amendment to the National Labor Relations Act as part of the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act), 73 Stat. 519. Section 8(e) was intended to "plug technical loopholes" in the secondary boycott prohibitions of § 8(b)(4), 29 U.S.C. § 158(b)(4), by making unlawful agreements between labor and management to refuse to deal with other employers (so-called "hot cargo" agreements) in order to affect their labor policies. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 634 (1967). Provisos exempting agreements in the construction and the garment industries were added prior to enactment by the Joint Conference Committee. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959), 1959 *U.S. Code Cong. & Admin. News*, p. 2511. Whether the construction industry proviso shelters such agreements when they are not confined to particular jobsites at which union workers are engaged is the primary issue in these cases.

to increase housing costs and decrease efficiency in the production of housing.

Economic efficiency is of critical importance to the housing industry at this time and will be no less so in the future. The explosive cost of credit for both builders and purchasers, and the spiraling cost of the construction of all types of residences, make economic efficiency in the housing market a key national goal, if not a necessity.

The Court of Appeals below also determined that resort to economic coercion to obtain union-signatory subcontracting agreements is lawful. This ruling licenses unions to coerce union and non-union home builders (if they employ members of the trade claimed by the union) to agree to refrain from subcontracting to firms who do not bargain with the coercing union. Most home builders (and their subcontractors) are powerless to resist this sort of coercion, as are most other construction contractors. Accordingly, they may be foreclosed from selecting subcontractors who are more efficient, but who do not have the appropriate labor agreements, even if the efficiencies of those subcontractors are not derived from any substandard wages and fringe benefits of their workers. Efficient non-union subcontractors also may be foreclosed from bidding on their work. Economic coercion of this type forces a contractor who otherwise would not participate in a lawful boycott of a subcontractor to act contrary to his judgment, and yet may confer no benefit on his or the subcontractor's employees. As argued within, and by Petitioners, such distortion of the marketplace was not authorized by Congress in Section 8(e).

NAHB regularly represents the interests of its members in matters affecting the housing industry, including labor relations, before the courts, the Congress and state legislatures, and independent regulatory agencies of the federal government. As part of this effort, NAHB recently appeared in this Court as an *amicus* in *San Diego Gas & Electric Co. v. City of San Diego*, 101 S. Ct. 1287

(1981), *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *City of Eastlake v. Forest City*, 426 U.S. 668 (1976).

This *amicus* brief is filed with consent of all parties as provided by Supreme Court Rule 36.2.

STATEMENT OF THE CASE

In the interest of brevity, *amicus* hereby adopts by reference the statements of the case contained in the Petitioners' briefs on the merits.

SUMMARY OF THE ARGUMENT

The Court of Appeals erroneously determined that clauses in labor agreements which prohibit construction contractors from subletting any work except to other union signatory employers are exempted from the "hot cargo" prohibition of Section 8(e) of the National Labor Relations Act by the construction industry proviso, and also erroneously determined that it is lawful for a union to strike or picket to compel a construction contractor to agree to such subcontracting clauses.

The Court of Appeals conclusion that subcontracting agreements are protected by the construction industry proviso is based principally upon the mistaken belief that the construction industry proviso serves not one but two primary purposes: prevention of "shoulder-to-shoulder" friction between union and non-union workers at the jobsite, and protection of union workers' contract standards from dilution through subcontracting. The first policy has been often noted in connection with Section 8(e), but the legislative history of Section 8(e) reveals no intention to protect contract standards at the expense of controlling the "top-down" organizing effects of such agreements. The policy of protecting contract standards is a belated addition to the interpretation of Section 8(e) proffered by the NLRB and the respondent unions below. As the Court of Appeals itself concedes,

however, and as this Court found in *Connell*, the overriding intent of Congress in 1959 was to restrict the evils of "top-down" organizing.

Amicus submits that the Court of Appeals decision failed to strike the proper balance among the competing policies, thereby permitting construction unions to "indiscriminately exclude nonunion subcontractors from a portion of the market, even if their competitive advantages are not derived from substandard wages and working conditions but rather from more efficient operating methods." *Connell*, 421 U.S. at 624. Proper interpretation of the construction industry proviso requires recognition of the need to balance the interest of workers in avoiding jobsite friction between union and non-union labor with the national labor policy of preventing wholesale "top-down" organizing. The first panel opinion of the Ninth Circuit,[5] and the dissenting opinion of Judge Sneed below, which state that subcontracting clauses are only protected by Section 8(e) when they are expressly limited to jobsites at which friction between union and nonunion workers can be expected, strike the appropriate balance.

The Court of Appeals conclusion that unions may strike or picket to obtain secondary subcontracting clauses is also erroneous. The legislative history and this Court's decision in *Sand Door*[6] show that the 1959 Landrum-Griffin Act preserved only *voluntary* subcontracting agreements. In reaching its decision, the Court of Appeals relied only on its reading of the language of the amended act, and on certain Court of Appeals decisions subsequent to the 1959 amendments which overruled the National Labor Relations Board's repeated determination

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[5] *Pacific Northwest Chapter, ABC v. NLRB*, 609 F.2d 1341, 1345-1350 (9th Cir. 1979) (panel opinion), *vacated on rehearing*, 654 F.2d 1301 (9th Cir. 1981) (*en banc*).

[6] *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB* (*Sand Door*), 357 U.S. 93 (1958).

that economic coercion to obtain a subcontracting clause is unlawful.[7] Section 8(e) should not be thus construed, however, as licensing construction unions to obtain *through coercion in bargaining* what they cannot obtain through coercion in a direct secondary boycott. Congress intended for the Landrum-Griffin Act to preserve uncoerced freedom of choice for construction employers, union and non-union alike, in determining whether to participate in boycotts.

ARGUMENT

I. THE CONSTRUCTION INDUSTRY PROVISO SHELTERS ONLY SUBCONTRACTING RESTRICTIONS AIMED AT REDUCING JOBSITE FRICTION.

The Petitioners contend that lawful union signatory subcontracting agreements must not only be made within a collective bargaining relationship, but also may only operate on jobsites where there is the possibility of friction arising between union and non-union employees. Their argument is based principally upon the view of the construction industry proviso articulated by this Court in *Connell*, and we agree with their position.

Union signatory subcontracting clauses dramatically restrict the home builder's or general contractor's choice

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[7] After the 1959 amendments adding § 8(e), the NLRB ruled unanimously that striking or picketing to obtain a subcontracting clause was unlawful under §§ 8(b)(4)(A) and (B). *Construction, Prod. & Maintenance Laborers Union, Local 393 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650 (1962), *rev'd*, 323 F.2d 422 (9th Cir. 1963). However, this view was rejected by several other Courts of Appeal, as well as the Ninth Circuit. *Essex County & Vicinity District Council of Carpenters & Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Bldg. & Construction Trades Council of San Bernardino v. NLRB*, 328 F.2d 540 (D.C. Cir. 1964). The NLRB subsequently acquiesced to these views in *Northeastern Indiana Bldg. & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *rev'd on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

of subcontractors, and also completely foreclose non-union subcontractor's from bidding on their work. The economic vice of union signatory subcontracting agreements is that they

> "indiscriminately exclud[e] non-union subcontractors from a portion of the market, even if their competitive advantages [are] not derived from sub-standard wages and working conditions but rather from more efficient operating methods."

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 623 (1975). The subcontracting clauses at issue in these cases have the effect of creating a protected market for the services of a select few unionized subcontractors. The necessary and intended effect of these clauses is to severely restrict the options of construction employers in selecting their subcontractors.

The NLRB and the respondent unions argue that such union signatory subcontracting clauses should be permitted in order to protect contract standards for unionized construction workers.[8] However, as this Court em-

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[8] The Ninth Circuit and NLRB also argue that union signatory clauses are part of a "pattern of collective bargaining" in the industry intended to be preserved by the proviso. This argument is built on insubstantial ground. As the majority opinion for the Ninth Circuit concedes, studies relied upon by the NLRB to show the "pattern of collective bargaining" in the industry are at best equivocal. The most glaring defect of such studies is that, as noted by the NLRB General Counsel, they also indicate that subcontracting clauses of the kind which all parties to this action agree are prohibited by this Court's ruling in *Connell* were as much a part of the "pattern of collective bargaining" in the industry in 1959 as any other. 1974 Labor Relations Yearbook (BNA 1975) 298, 307. These studies thus hardly provide a secure foundation for the conclusion that construction industry subcontracting clauses of the kind in question here are to be preserved by the proviso. In addition, there is simply no reference in the legislative history to the specific kinds of clauses which Congress intended to preserve. The General Counsel, who conducted an exhaustive survey of this topic, deemed the reports too inconclusive and equivocal to be relied upon. In short, there is little or no reliable basis for the conclusion that

phatically noted in *Connell*, "curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers." 421 U.S. at 623. In these cases, this Court is again presented with the difficult question of how to strike the proper balance between these competing interests.

In *Connell*, this Court was concerned that the union signatory subcontracting clause forced upon Connell Construction Company would give the union "power to control access to the market" by subcontractors. 421 U.S. at 624. The Court noted that, by prohibiting subcontracting to any firm that did not have a contract with the union, the union achieved

> "complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse affects upon the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions."

421 U.S. at 624. The economic consequences of making substantial numbers of subcontractors "ineligible to compete for a portion of the available work" (*Connell*, 421 U.S. at 625) does not require elaboration. Such "sheltering" of union subcontractors "from outside competition in that portion of the market covered by subcontracting agreements" has the effect of "eliminating competition on all subjects covered by the multi-employer agreement, even on subjects unrelated to wages, hours, and working conditions." *Connell*, 421 U.S. at 624. This is an effect which the national housing market and con-

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Congress specifically intended in 1959 to preserve the types of subcontracting clauses at issue here. We submit that the only fair reading of the evidence on this subject is that the actions of Congress cannot be read as supporting any specific sort of subcontracting restriction.

struction industry simply cannot bear in the unlimited form sanctioned by the Court of Appeals.

This Court has repeatedly stressed the importance of Sections 8(e) and 8(b)(4) to the national policy of preventing adverse economic consequences of hot cargo agreements and boycotts. This Court summed up, we believe, the outermost bounds of permissable union conduct in this area in *Connell*:

> "Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members."

421 U.S. at 622. This "Congressional policy favoring free competition in business markets" (*Connell*, 421 U.S. at 622) is as indispensable to the proper interpretation of the construction industry proviso as it is to the interpretation of labor's exemption from the antitrust laws which was the principal concern of *Connell*.

The premise that the construction industry proviso must be interpreted so as to provide *maximum protection* for the contract standards of unionized employees of general contractors was adopted by the NLRB and the Ninth Circuit for the first time in the course of this litigation. The Board previously interpreted Section 8(e) as directed at the problems of jobsite friction between union and non-union employees. *International Union of Operating Engineers, Local 542 (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). Prior to its consideration of these cases, the Ninth Circuit had concluded that the dominant purpose of the construction industry proviso was to permit agreements aimed at eliminating jobsite friction between union and non-union employees. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975).

There is no legislative support for the view that the proviso must be interpreted in light of a national policy of

affording maximum protection for contract standards of union construction workers.[9] The Court of Appeals majority strains to lay a foundation for this policy by arguing that the 1959 amendments were intended to accommodate the special features of construction industry bargaining (the closed shop, pre-hire agreements and subcontracting restrictions) within the inconsistent structure of the 1947 Taft-Hartley Act. *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1309-10 (9th Cir. 1981). However, the Court of Appeals does not identify any statements in the legislative history which support this view.[10] Instead, the court reaches back to 1954, *five years* prior to the enactment of Landrum-Griffin to cite statements by then President Eisenhower calling for generalized reform of Taft-Hartley to permit the closed shop, pre-hire agreements, and secondary boycotts of the type outlawed by this Court in *Denver Building Trades*.[11] 654 F.2d at 1310. These remarks are, of course, irrelevant to the question of voluntary hot cargo agreements, the topic of Section 8(e).

The overriding policy of the 1959 Act was clearly identified by this Court in *Connell*:

> "One of the major aims of the 1959 Act was to limit "top down" organizing campaigns, in which unions

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[9] The legislative history is sprinkled, however, with references to the importance of controlling the damaging economic effects of both "hot cargo" agreements and coercive boycotts. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959), 1959 *U.S. Code Cong. & Admin. News*, pp. 1136, 1149, 2443-44; Declaration of Findings, Purposes and Policy, Labor-Management Reporting and Disclosure Act of 1959, Pub.L. No. 86-257, § 2(c).

[10] The District of Columbia Court of Appeals in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 877 (D.C. Cir. 1980), *cert. denied* 101 S.Ct 2058 (1981) adopts a similar view that the proviso protects "continuity of work and benefits for employees" merely based upon the assertion that this policy is "consistent" with the intent of Congress.

[11] *NLRB v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675 (1951).

> used economic weapons to force recognition from an employer regardless of the wishes of his employees."

421 U.S. at 632. After an exhaustive examination of the legislative history, the Court concluded that the construction industry proviso was adopted as a "partial substitute" for legislation intended to permit secondary boycotts against employers engaged in work at a common construction site. In *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 638-639 (1967), this Court also interpreted the construction industry proviso as directed primarily to the problem of jobsite friction between union and non-union workers—the overriding concern in *Denver Building Trades* which certain unsuccessful bills proffered as amendments to the 1959 Act addressed. This, together with the *Connell* Court's repeated references to the fact that the subcontracting agreement sought by the union was not "limited to a particular jobsite" suggests that the construction industry proviso should be narrowly interpreted as sanctioning only those subcontracting clauses which are addressed to the problems of friction between union and non-union employees on particular jobsites where union employees of the general contractor are present. This is the interpretation adopted by the original panel opinion of the Ninth Circuit below. It is the only interpretation which accounts for the overriding economic considerations previously identified by this Court as a major policy of the 1959 Amendments.[12]

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[12] In any event, the use of union signatory subcontracting clauses is not necessary to protect contract standards. So-called "union standards" clauses, which forbid employers to subcontract except to firms which meet or exceed union wages and fringe benefits but allow non-union firms meeting those standards to bid on the work, accomplish this same protective result without creating a privileged class of subcontractors. In addition, union standards clauses do not undermine the policies of § 7 of the National Labor Relations Act, 29 U.S.C. § 157, by requiring subcontractors' employees to join and be represented by the union.

Moreover, even accepting that protecting building trade unions' contract standards is a policy to be considered in interpreting and applying Section 8(e), the question is not what interpretation of the construction industry proviso best serves this single interest, as the NLRB and the Ninth Circuit apparently assume, but rather how to balance this interest against the competing policies which this Court articulated in *Connell*.

In *Connell*, this Court identified the prevention and control of unlimited "top-down" organizing through secondary boycotts and hot cargo agreements as a primary, if not the primary, motivation behind the 1959 amendments. The legislative history unequivocally demonstrates that Congress' primary concern in the Landrum-Griffin Act was to complete the framework for legislative control of both voluntary boycott agreements and union coercion to achieve secondary boycotts. Accordingly, the construction industry proviso to Section 8(e) must be read narrowly. The Court of Appeals ruling ignores these policies underlying the act. The hidden, unspoken premise in the NLRB's and Court of Appeals arguments is that, having identified the policy, it must necessarily govern. We submit that the proper balance is to recognize, as the dissenters and the original panel below did, that subcontracting clauses must be fashioned so as to prohibit subcontracting except to union signatories *only* in situations where union workers may clash with non-union workers on particular jobsites. To do otherwise creates no balance whatsoever between the overriding policy of limiting "top-down" organization and the protection of contract standards.

The original panel correctly recognized the adverse economic consequences of permitting use of union signatory subcontracting clauses as unlimited "top down" organizing weapons.

> "We cannot extend the proviso's protection beyond the purpose for which the exemption was created

> without creating a shield of immunity for agreements which we believe Congress wished to prohibit . . . [A] subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect."

Pacific Northwest Chapter, ABC v. NLRB, 609 F.2d 1341, 1350 (9th Cir. 1979), *vacated on rehearing*, 654 F.2d 1301 (9th Cir. 1981). Accordingly, they held that:

> "The construction industry proviso extends shelter only when a collective bargaining relationship exists, and even then only when the employees who are members of the signatory union are at work at sometime at the jobsite at which the employer wishes to engage a non-union subcontractor."

609 F.2d at 1347.

II. STRIKES AND PICKETING TO OBTAIN "HOT CARGO" AGREEMENTS FROM CONSTRUCTION CONTRACTORS VIOLATE SECTION 8(b)(4)

In the *Sand Door* decision, this Court recognized the strong federal policy of protecting the contruction employer's freedom to choose whether to refuse to deal with another in support of a labor dispute not his own.[13] Al-

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[13] *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB (Sand Door)*, 357 U.S. 93, 105 (1958):

> "the freedom of choice for the employer contemplated by Section 8(b)(4)(A) [now §8(b)(4)(A) and (B)] is a freedom of choice at the time the question of whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—*must as a matter of federal policy be available to the secondary employer* notwithstanding any private agreement entered into between the parties." (emphasis supplied)

though this Court was addressing the issue of the legality of picketing to *enforce* such agreements in that case, the freedom of choice which is threatened in these cases is the same. The touchstone as to whether picketing to obtain hot cargo agreements was illegal under the old Section 8(b)(4)(A), and thereby dispositive of the same issue today under Sections 8(b)(4)(A) and (B), is "*whether the employer has in fact truly sanctioned and supported the boycott, and whether he has exercised the choice contemplated by the statute.*" [14] It is only by protection of the construction employer's right to choose with whom he will deal that competitive efficiencies unrelated to wages and working conditions can be accommodated in the construction market.

The Court of Appeals below concluded that at the same time Congress intended to prohibit building trades unions from using economic weapons to enforce hot cargo agreements, it intended to sanction the use of those weapons to force construction employers to enter into such agreements. Examination of the legislative history and this Court's decisions pre-dating the enactment of the Landrum-Griffin Act, however, leads to but one conclusion: that at the time the 1959 amendments were added to the National Labor Relations Act, construction unions were forbidden from using coercion to force employers to involuntarily agree to hot cargo agreements. In other words, by enactment of the construction industry proviso to Section 8(e), Congress granted labor organizations and employers in the construction industry only a limited exemption from the general prohibition against entering *voluntary* hot cargo agreements, and nothing more.

This Court has previously reviewed the legislative history and case authority preceding the enactment of the construction industry proviso. *Connell*, 421 U.S. at 628-630; *National Woodwork*, 386 U.S. at 638-39. The Court found it unnecessary then to decide whether a construc-

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[14] *Sand Door, supra* note 13, 375 U.S. at 107.

tion union could lawfully picket or strike to obtain a hot cargo agreement. *Connell*, 421 U.S. at 633 n.14. Now, this Court has the opportunity to clarify the permissible range of construction unions' coercive powers and to decide whether the construction employer's right to choose with whom he does business is entitled to protection from such economic pressures.[15]

A. The Landrum-Griffin Act Merely Preserved The Status Quo As To The Legality Of Coercion To Obtain Hot Cargo Agreements.

The Conference Committee on the Landrum-Griffin Act, the last legislative pronouncement before enactment, emphatically stated that the construction industry proviso was to leave unaffected the law developed under Section 8(b)(4).[16] Senator Barry Goldwater, one of the Senate

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[15] The respondent unions assert that review of this issue is foreclosed by § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The short answer to this contention is that the issue was briefed, argued and determined by the Court of Appeals and is therefore presented for review by this Court. Moreover, the Court has inherent power to determine even legal issues never raised or resolved in the proceedings below if the case compels or presents an appropriate opportunity for such a decision. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Rogers v. United States*, 442 U.S. 35 (1975).

[16] The Conference Committee stated:

> "To the extent that such agreements are illegal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. *It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with*

conferees (and whom the Court of Appeals characterized as "the man who may have been most responsible for" the Landrum-Griffin Act)[17] emphasized with equal clarity that the 1959 Amendments were not to be looked to in determining whether such picketing was lawful.[18] Senator John F. Kennedy, leader of the Senate conferees, expressed a similar understanding of the 1959 Act.[19] There-

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respect to the legality of a strike to obtain such a contract." (emphasis supplied)

H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959); 1959 *U.S. Code Cong. & Admin. News*, pp. 2511-12.

[17] *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1323 n. 41 (9th Cir. 1981).

[18] Senator Goldwater stated:

"*The new provision is silent with respect to the lawfulness of coercion or restraint—economic or otherwise—by one party to compel the other party to enter into, or even to bargain about entering into such an agreement.* This question was one of those left unresolved by the Board and the courts under Taft-Hartley prior to this new legislation, but now specifically outlawed in all situations not falling within the exemption for the clothing and apparel and construction industries. *It is the intention of Congress that the new legislation leave it in the same unresolved status under the building construction industry exemption and that the Board and the courts decide the issue for the building construction industry as if these new amendments contained in Section 8(e) had not been enacted and in accordance with the previously applicable law.* In other words, it is the congressional intent that Section 8(b)(4), as amended, banning secondary boycotts, apply without qualification in the building construction industry and that the principles enunciated in the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93), the *Denver Building Trades* case (*NLRB v. Denver Building and Construction Trades Council, et al*, 341 U.S. 675), and the *Moore Drydock* case (*Moore Drydock Co.*, 81 N.L.R.B. 1108), remain fully applicable." (emphasis supplied)

II *Legislative History of The Labor-Management Reporting & Disclosure Act of 1959*, 1858.

[19] Senator Kennedy stated that:

"Since the proviso does not relate to Section 8(b)(4), . . . It is not intended to change the law with respect to judicial en-

fore, if unions were prohibited from using economic weapons to force employers to enter into such agreements under the unamended version of Section 8(b)(4), then they continue to be prohibited from doing so under the amended version, regardless of the language contained in Section 8(e) and 8(b)(4). This point is crucial because the Court of Appeals, which held such picketing to be lawful, based its decision principally upon the language of Section 8(e) and the amended, new Section 8(b)(4)(A).[20]

The Court of Appeals ruling simply ignores the above referenced legislative history which clearly indicates that it is not the 1959 act, but the Taft-Hartley Act which the courts must interpret to define the scope of permissible striking and picketing under Section 8(b)(4) and Section 8(e). Thus, the instant cases were incorrectly decided on the basis of a negative implication arising from a rule of construction, a view which is almost convincing if one examines merely the amended statutory language in isolation from the legislative materials.[21]

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forcement of these contracts, or with respect to the legality of a strike to obtain such a contract."

II *Legislative History of The Labor-Management Reporting & Disclosure Act of 1959*, 1433.

[20] *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1323 (9th Cir. 1981). *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 869 n. 15 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981), and other Courts of Appeal previously considering this issue reached the same conclusion, but also based their decision on the same faulty analysis. *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County & Vicinity District Council of Carpenters & Millwrights*, 322 F.2d 636 (3d Cir. 1964). The NLRB has acquiesced in these erroneous views. *Northeastern Indiana Bldg. & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

[21] The argument is that, since the actual language of the current § 8(b)(4)(A) prohibits coercion of any person "to enter into any

Once the Court of Appeals reasoning on this primary point has been shown to be fatally flawed, the remaining arguments in support of its position are easily dispelled.

The Court of Appeals had previously considered this issue and held that the Conference Committee's elimination of the phrase "or agree to cease" from Section 8(b)(4)(B) was additional support for this position.[22] Since the Conference Committee deleted those words from Section 8(b)(4)(B) because the restrictions imposed by such language were already included in other provisions prohibiting entering into hot cargo agreements and therefore believed to be duplicative, it is argued, Section 8(b)(4)(B) now only prohibits the enforcement of such agreements. This analysis actually proves the opposite conclusion. If Congress believed the placement of such language in Section 8(b)(4)(B) was simply duplicative of another section of the statute (primarily 8(b)(4)(A)), then Congress did not believe that it eliminated any legal right by dropping the language from Section 8(b)(4)(B). In other words, Congress perceived this language as *adding* nothing substantive to the Act. If such language had been included in Section 8(b)(4)(B), the picketing in the instant cases (and any other picketing which was directed at forcing an employer to enter a lawful hot cargo agreement) would clearly be illegal. Therefore, Sections 8(b)(4)(A) and (B) still prohibit coercion to obtain hot cargo agreements.

Moreover, Congress would not have used the language "an agreement" in the construction industry proviso un-

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agreement which is prohibited by [§ 8(e)]", the "negative implication" of this provision is that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful. This ignores both Goldwater's and Kennedy's statements, and ignores the function of § 8(b)(4)(B), formerly § 8(b)(4)(A), under the Taft-Hartley Act.

[22] *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422, 426-27 (9th Cir. 1963).

less it actually meant a "voluntary agreement".[23] The legislative history of Section 8(f), 29 U.S.C § 158(f) is relevant here. Section 8(f), like Section 8(e), also uses only the term "an agreement" wherein it is specifically referring to a voluntary, uncoerced agreement.[24] Both of these provisions were adopted in 1959 as part of the same Act. Both are directed at limiting labor's use of economic weapons to force "top-down" organizing upon employers and their employees. Accordingly, Section 8(e) must be read, like Section 8(f), as only referring to voluntary subcontracting agreements.

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[23] In *Essex County & Vicinity District Council of Carpenters & Millwrights v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964), however, the Third Circuit Court of Appeals argued that since Congress could have used the more restrictive term "voluntary agreement" in the text of the construction industry proviso, it surely intended not to so limit the scope of the proviso by choosing instead the words "an agreement." This analysis is backward for the reasons stated in the text.

[24] Congress was careful to make its intention clear that the pre-hire agreements newly authorized under accompanying § 8(f) were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle. Representative Barden, an important House floor leader on the Bill and a conferee, explained the voluntary nature of the pre-hire agreement exception by quoting this explanation of § 8(f) from Senator Kennedy:

> "Mr. Kennedy: I shall answer the Senator from Florida as follows—It is my intention, by so answering, to establish the legislative history on this question: It was not the intension of the Committee to require by Section 604(a) the making of pre-hire agreements, but, rather, to permit them; nor was it the intention of the Committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a pre-hire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary pre-hire agreements."

II *Legislative History of the Labor-Management Reporting & Disclosure Act of 1959*, 1715. The House Conference Report similarly stressed that "[n]othing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to

B. Prior To The Enactment Of The Landrum-Griffin Act, Coercion To Obtain "Hot Cargo" Agreements Was Prohibited.

This Court acknowledged in *Connell* the essential role of the 1959 Amendments in preventing secondary boycotts:

> "Section 8(e) was part of a legislative program designed to plug technical loopholes in Section 8(b)(4)'s general prohibition of secondary activities. In Section 8(e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by Section 8(b)(4)."

421 U.S. at 628. As noted by this Court in *NLRB v. Denver Building & Construction Trades Council (Denver Building Trades)*, 341 U.S. 675, 686 (1951), Senator Taft, a sponsor of the Taft-Hartley bill in the Senate and Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, declared that his

> "Committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. 93 Cong. Rec. 4198."

The Court concluded in *Denver Building Trades* that Section 8(b)(4) "restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else." 341 U.S. at 687. The Court of Appeals decision below requires one to accept the contrary premise that Congress intended to permit unions to use economic weapons to force employers to enter into agreements, the object of which Congress also condemned and declared an unfair labor practice. If we apply the test

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compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 42 (1959), 1959 *U.S. Code Cong. & Admin. News*, pp. 2318, 2514. See *Connell*, 434 U.S. at 348.

set forth by this Court in *Denver Building Trades*, however, picketing to obtain union signatory subcontracting clauses is "economic pressure where an object of it is to force an employer . . . to boycott someone else" and therefore within the scope of the prohibition contained in Section 8(b)(4)(A) prior to the enactment of the Landrum-Griffin Act.

In *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB* (*Sand Door*), 357 U.S. 93 (1958), this Court distinguished between hot cargo agreements entered into *voluntarily* [held to be beyond the scope of Section 8(b)(4)] and those entered into in response to economic coercion.[25] To say, as the Court of Appeals has said in these cases below, that a union may use economic weapons to accomplish by way of contract what it is clearly prohibited from accomplishing when the subcon-

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[25] As the Court stated:

> "Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A). The Section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. *It forbids a union to induce employees to strike against . . . their employer when an object is to force him . . . to cease doing business with some third party.* Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person . . . *a boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specific prohibited means of coercion through inducement of employees.*"

357 U.S. at 98-99 (emphasis added).

tractors are working at the construction site, completely contradicts this Court's perception in *Sand Door* that only "voluntary" agreements were excluded from the prohibitions of Section 8(b)(4).

The specific determination of this Court in *Sand Door* is that strikes or picketing in order to enforce otherwise lawful agreements restricting subcontracting are illegal. 357 U.S. at 106. In order to reach this conclusion, the Court reasoned that Congress contemplated "freedom of choice" for the employer at the time when the question of whether to participate in the boycott of the primary employer targeted by the union arises. 375 U.S. at 105. The Court noted that the employer's "intelligent exercise of such a choice" was at its peak in a concrete situation, and was less capable of being exercised during collective bargaining when an agreement is "drawn up covering a multitude of subjects, often in a general and abstract manner." 357 U.S. at 106. Accordingly, the "possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned" supported the conclusion that strikes and picketing to enforce such clauses could not be tolerated consistently with the voluntary choice Congress intended to allow employers concerning whether to support union-inspired boycotts. 375 U.S. at 106. This reasoning in support of the Court's holding that strikes and picketing to enforce hot cargo agreements are prohibited applies with even greater force in the context of strikes or picketing to obtain an employer's agreement to such boycotts through restrictive subcontracting clauses. If it is contrary to the intention of Congress that an employer be denied a voluntary choice whether to support such boycotts, it is surely even more objectionable to permit coercion in the exercise of such choice during the time when collective bargaining agreements are drawn covering "a multitude of subjects" in a "general and abstract manner" rather than in the impact of a "concrete situation." 357 U.S. at 105-06.

What emerges from this Court's opinion in *Sand Door* is the basic premise that a construction employer's freedom to choose with whom he deals is an important federal policy. That freedom is no less important when exercised in the context of collective bargaining with a union than when the employer is engaged in work on the construction site.[26] Accordingly, this Court ruled in *Sand Door* that a union could not picket to enforce such an agreement even if the employer entered the agreement voluntarily.

This Court also should now rule that the construction employer's freedom to choose with whom he does business is entitled to protection from the effects of economic coercion at the time of collective bargaining as well. If a construction employer is to enjoy the freedom of choice to decide whether he will voluntarily support a boycott "for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interest with those of his employees and their union," (*Sand Door*, 357 U.S. at 98-99) he must be able to arrive at his decision in an atmosphere free from the powerful pressures associated with union coercion. Of course, unions are still free to approach a construction employer to persuade him to participate in a lawful boycott. Pressuring the employer by

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[26] The distinction drawn by the Ninth Circuit in *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422, 426 n.2 (9th Cir. 1963) between an employer's choice to refuse to deal with another arising in a concrete situation as opposed to when it arises at the time of collective bargaining (a distinction which this Court first discussed in *Sand Door*) is rendered meaningless where a union uses economic coercion to achieve its secondary objective in bargaining. The nature of the construction industry is characterized by a series of business relationships between general contractors and subcontractors that are established when these employers work together periodically from job to job. To say that such business relationships are unworthy of protection from union coercion in between jobs is to render this Court's discussion in *Sand Door* meaningless.

strikes or picketing, however, undermines the contractor's ability to weigh such participation against the benefits and opportunities derived from dealing with a wide variety and large number of subcontractors.

This Court's decisions following the enactment of the Landrum-Griffith Act are in harmony with the position that unions should be restrained from using economic coercion to obtain subcontracting clauses. Its most recent discussion of Section 8(e) appears in *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers (Higdon Construction Co.)*, 434 U.S. 335 (1978). In *Higdon*, this Court drew a comparison between Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), which permits so-called pre-hire agreements in the construction industry, and the proviso to Section 8(e), to illustrate the point that a prohibition against picketing does not render trade unions' statutory right to enter into voluntary agreements meaningless. *Higdon*, 434 U.S. at 349 n. 11. Our position that unions will remain free to approach construction employers to persuade them to voluntarily cease doing business with certain subcontractors is in accord with the Court's view as expressed in *Higdon*.

Similarly, in *National Woodwork*, this Court noted that the situation in which a union used economic weapons as a sword to acquire new jobs or to monopolize a market must be distinguished from the situation in which such weapons are used as a shield to preserve jobs. 386 U.S. at 630. The unions in the instant cases are using their right to picket as a sword to promote secondary objectives elsewhere, and as such, violate the spirit and the letter of the unamended Section 8(b)(4) of the Taft-Hartley Act.

> "In effect Congress, in enacting § 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra*, and barred as

> a secondary boycott union activity directed against a neutral employer, including the immediate employer, when in fact the activity directed against him was carried on for its effect elsewhere."

National Woodwork, 386 U.S. at 632. Lastly, as previously discussed herein, in *Connell* the Court recognized the undesirable consequences of "top down" organizing campaigns. It is the position of *amicus* that construction unions will have finally found a lawful means by which to accomplish the identical secondary objectives they sought to accomplish in *Connell* if they are permitted to engage in unlimited picketing to pressure construction employers to cease doing business with subcontractors.

In summary, the voluntary participation exception to the original Section 8(b)(4)(A) identified by this Court in *Sand Door* supports the finding that union picketing to force employers to enter such agreements was illegal at the time of the enactment of the Landrum-Griffin Act.

Moreover, Congress has again and again demonstrated that the only secondary boycotts and "top-down" organizing that it will tolerate are of a voluntary nature, free from the extraordinary pressures associated with the use of picketing and strikes. Not surprisingly, this was the position of the NLRB for a number of years following the enactment of the Landrum-Griffin Act,[27] until the Board finally acquiesced after repeatedly being overturned by the Courts of Appeal which erroneously con-

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[27] In a unanimous five-member decision in *Construction, Prod. & Maintenance Laborers Union, Local 383 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650, 1652 n. 7 (1962), *rev'd*, 323 F.2d 422 (9th Cir. 1963), the NLRB convincingly argued:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective . . ."

cluded that such picketing was sanctioned by the Landrum-Griffin Act.

CONCLUSION

For the reasons advanced above, and for the reasons advanced by the Petitioners, this Court should rule that the proviso to Section 8(e) of the National Labor Relations Act only protects subcontracting clauses which are limited in application to jobsites at which union employees of the signatory contractor may encounter non-union workers of their trade, and that economic coercion of the type prohibited by Section 8(b)(4) of the Act may not be used to obtain an employer's participation in a hot cargo agreement.

Respectfully submitted,

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Nos. 81-91, 80-1808, & [illegible]798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUPREME COURT, U.S.
FILED
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ALEXANDER L. STEVAS,

No. 81-91

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 80-1798

WOELKE & ROMERO FRAMING, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

This brief *Amicus Curiae* in support of the position of the petitioners, and in support of the legal right

of all of the individual employees in the United States, is filed by the National Right to Work Legal Defense Foundation pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is an organization formed to protect the Right to Work, freedom of association, freedom of speech and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation's primary interest is in aiding any employee, or potential employee, whose human and civil rights have been infringed or are threatened because of injustices arising out of compulsory unionism arrangements.

If affirmed, the Ninth Circuit's interpretation of § 8(e) of the National Labor Relations Act will:

(1) provide for unlimited "top down" organizing in the construction industry,

(2) destroy the delicate balance between the federal labor and anti-trust laws, and

(3) most importantly, deny individual employees in the construction industry their associational rights guaranteed by § 7 of the Act.

The Foundation does not doubt that the petitioner-employers will fully argue their interests. However,

because their interests will naturally focus on their ability to conduct business unrestrained by union activity, the Foundation submits that it can and will properly and completely argue the position of the employees affected by this decision. The Foundation is thus in a position, as advocate of all employees who wish the opportunity to exercise the freedom of choice regarding representation by a labor organization, to contribute its assistance to the Court to properly set forth the issues involved and the broad ramifications that any decision of this Court might have on all construction employees.

SUMMARY OF ARGUMENT

The National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 151-169, and as interpreted by this Court since 1935 represents a continuing legislative and judicial effort to delicately balance numerous policies of major national importance. These policies, as they relate to this case, are: first, the guiding principle and goal that employees shall have the right to participate in self-organization, collective bargaining, and concerted activities or to refrain from these activities subject only to the limitation imposed by § 8(a)(3) and § 9 of the NLRA; second, the prohibition against "hot cargo" and secondary boycott agreements in furtherance of a policy of unfettered and unrestricted commerce between the states; and third, a need to eliminate, to the extent possible, the crippling effects of strikes and picketing brought about by labor unrest said to be caused by permitting union and nonunion workers to work at the same construction-site.

These competing policies are part of the overall national policy to develop laws that will permit busi-

ness to thrive in a free enterprise society with minimal interference with the rights of employees, labor organizations, and employers.

The decision of the Ninth Circuit has focused narrowly on the policy to secure labor peace at the construction site and has thereby effectively eliminated the freedom of association of the employee and destroyed the freedom of the employer-contractor to choose with which firms he will do business.

The Ninth Circuit opinion torturously explains how the principles set forth by this Court in *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) do not apply. The *en banc* majority of the court relied upon the bargaining relationship existing between the unions and employees in these cases to distinguish *Connell.* And, in this distinction, the court found a basis to ignore the policy to prevent unfettered top-down organizing, as expressed by Congress through the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519 (1959) and as discussed in *Connell,* in favor of a perceived need to secure peace at the workplace at all costs.

This Foundation is of the view that the construction industry proviso of § 8(e) is an integral part of the delicate balance of the policies discussed above, and that the proviso must be interpreted with a view to preserving the balance thus far achieved by Congress and the courts. The Ninth Circuit's emphasis on labor peace at the work site destroys this balance. Competition, as well as labor strife, will be driven from the construction workplace. And the freedom of choice, as it pertains to the decision of the individual

worker, will no longer be a recognizable right. The unions will effectively control the workers, the choice of contractor, the costs of the project, and for all purposes the quality of the work performed. Such an overwhelming imbalance has never been the policy of the Congress, and it must not be permitted to flourish through judicial fiat in the absence of congressional intent.

ARGUMENT

Central to the resolution of these cases is the determination of the scope of the construction industry proviso of § 8(e) of the NLRA. 29 U.S.C. § 158(e). More specifically, whether the proviso permits a union to negotiate an agreement that prohibits the employer-contractor from subcontracting construction site work to any firm or person that does not have a current effective negotiated agreement with that union.

The Ninth Circuit considered the validity of such clauses in the context of two factual settings that are remarkably similar to the facts in *Connell*. First, the agreement with the Associated General Contractors (AGC) was a master labor agreement that had been negotiated between AGC and Local 701 of the International Union of Operating Engineers (Engineers). The agreement covered approximately 200 contractors doing business in Oregon and parts of Washington, and ostensibly covered all work within the jurisdiction of Local 701 throughout that geographical area for a period of five years. The agreement not only covers work ongoing at the inception of the agreement, it covers work yet to begin and yet to be conceived. This multi-employer contract is for all purposes identical to the agreement between the

Local 100 and the Mechanical Contractors Association of Dallas that existed in *Connell.*

Second, the Ninth Circuit considered the same "specific union only" subcontracting clause that was the point of contention between Woelke and Romero Framing, Inc. and Locals 235 and 944 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters). This latter relationship is similar to the agreement between the Connell Construction Company and Local 100 that fostered this Court's opinion in *Connell.* However, neither the AGC or the Woelke-Romero contract contains a "most favored nation clause" as found in the Mechanical Contractors Association agreement in *Connell.*

The significant factual distinction between *Connell* and the instant cases is that in *Connell* there was no ongoing collective bargaining relationship. In these cases a collective bargaining relationship has been stipulated.

The Ninth Circuit reviewed the "specific union only" subcontracting clauses in the instant cases in light of the legislative history of the Labor Management Reporting and Disclosure Act of 1959 and the decision of this Court in *Connell,* but decided to disregard this Court's concerns for the "stranger - contractor", "job-site work", and "top-down organizing" issues because of the existence of a collective bargaining relationship in these cases. Yet, almost as an apology, the Ninth Circuit conceded that "the language of the *Connell* opinion dealing with congressional antagonism toward 'top down organizing' may well lean in a direction contrary to our views." 654 F.2d 1301, 1320 (9th Cir. 1981).

The Ninth Circuit, by focusing on the narrow factual distinction in *Connell* regarding the lack of a collective bargaining relationship, failed to take this Court's advice regarding the need to balance the nation's anti-trust and labor policies. Thus, the Ninth Circuit avoided the considerable anti-trust issues and the attendant critical Section 7 considerations that must be resolved in order to preserve the delicate balance of the competing significant public interests represented by these cases.

I. THE EFFECT OF THE NINTH CIRCUIT DECISION

The primary effect of the Ninth Circuit decision is to permit the enforcement of "specific union only" subcontracting clauses in large regional master labor agreements between very large employer-contractor groups and specific unions within the construction industry. Distilled to its basic ingredients, this holding means that none of the 200 contractors who are signatories to the master labor agreement with the Operating Engineers in the Oregon-Washington area can subcontract any of the work, either general or detailed, to be done on any construction project during the life of the contract, unless the firm to be employed has an existing negotiated agreement with the Engineers.

Viewed from another perspective, the ruling means that no prospective sub-contractor can hope to be a successful bidder for any work on any projects controlled by any of the 200 contractors throughout the Washington-Oregon area for a period of five years unless the firm has an existing agreement with the Engineers. This is true, not only in the case where

the prospective subcontractor is not a party to a collective bargaining agreement, but even where there is an existing negotiated agreement—and therefore an exclusive bargaining representative—if that agreement happens to be with a competing union.

Viewed then from the level of the subcontractor's employee, not only is he required to be a member of the union or to pay an agency fee to safeguard his employment, he must also have correctly elected to be organized by the proper union, in this case the Engineers. For if he should have exercised his § 7 franchise to elect a competing union, or no union, he shall be precluded from work in a significant portion of the construction industry in Oregon and Washington for a long time. In fact, to the extent that Local 701 [1] is successful in achieving "specific union only" clauses with additional contractors throughout the region, employees who are members of other unions or in unorganized firms will be precluded from any work at all.

Furthermore, in cases where any union is successful in securing "specific union only" clauses throughout a substantial portion of the construction industry in a particular region, it will have achieved the monopolistic power to destroy any competing union, or any firm unfortunate enough to have a competing union as its exclusive bargaining representative, or any firm that is unorganized. The protected union can then manipulate competition throughout the industry by

[1] The "specific union only" clauses contained in the Engineers and Carpenters agreements are identical for the purpose of this argument. All references to the Local 701 agreement are meant to apply equally to the Carpenters agreements in the *Woelke & Romero* case.

selectively limiting the firms with which it will sign agreements. By refusing to enter agreements with other firms, the union can effectively drive them out of business. The ability of a particular union to decide which firms will be eligible to bid on construction projects gives the union a strangle-hold over all subcontractors, all general contractors and all employees throughout the industry. Essentially, it is equivalent to absolute control of the industry, licensed by federal labor statutes.

In such a climate, the Section 7 rights of the employee to refrain from organizational activities, or even to select a representative of his own choice, will be effectively and deliberately destroyed.

II. THE LEGISLATIVE HISTORY OF § 8(e)

Recent history has produced a broad range of opinions regarding congressional intent leading to the enactment of the LMRDA, especially as to the scope of the § 8(e) construction industry proviso. Yet, there is at least some agreement that the basic purposes of the § 8(e) proviso were to accommodate the union's difficult organizing problems in the construction industry and to eliminate the work-site friction said to be caused by union and non-union workers working side by side on construction projects. Unfortunately, the legislative history fails to disclose whether there was any intent to limit the form of subcontracting clauses under the 8(e) proviso. At best there seems to be agreement that the proviso permits unions and prime contractors in the construction industry to enter into agreements in which the contractor refuses to subcontract to nonunion operators. *See* 2 Legislative History of the LMRDA pp. 1818, 1821, 1858.

Because of the facts of this case, it is important to distinguish between the types of firms with which general contractors can subcontract. Specifically, they will be either firms with agreements entered into pursuant to either §§ 8(f) or 9(a) with the same union, or firms with agreements or recognitional obligations with unions other than the union with which the contractor has an agreement, or unorganized, i.e., nonunion firms.

Throughout the legislative history, the comments relative to § 8(e) proviso subcontracting refer only to the authority to limit subcontracting to "union" subcontractors. There is no grant of affirmative authority which would permit a union to limit subcontracting to agreements only with a specific union. To this extent, a distinction must be recognized between the purposes to be effected by "union only" clauses which would insure that none of the workers on the job site were nonunion, and "specific union only" clauses which would insure that all of the workers within any work jurisdiction on any job site would be members of the *same* union.

Although it is perhaps arguable that one of the purposes of the Landrum-Griffith Amendments was to eliminate job-site friction by permitting agreements that insure all on-site workers to be union members, it has never been argued that one of the purposes of the Amendments was to provide for the security of one union over a competing union. And, although it may be a legitimate goal for any union to attempt to exclude other competing unions through the process of negotiation with the various employers, a review of the history of the Amendments does not permit a conclusion that Congress intended to vest

unassailable organizational preferences in a single union simply because it was able to effect a prehire agreement with a group of major contractors.

Another aspect of the subcontracting clause that is not discussed with clarity within the legislative history is the type and extent of subcontracting problem that precipitated enactment of the proviso. It is one thing to examine a single construction project and conclude that it is within the scope of federal labor policy to permit a general contractor to enter into an agreement, for the sake of job-site peace, that would limit his subcontracting rights to firms with union affiliation. It is an entirely different matter to extend the benefits of that rationale to permit a specific union to contractually require hundreds of contractors in a multi-state region to refrain from entering into any subcontracts with firms who are either unorganized or who are signatories to agreements with unions other than the general contractor's union, and to extend these agreements not only to projects underway but to any projects the contractor might contemplate in the future. While it is conceivable that the evil to be controlled by the limited form of top-down organizing in the first instance might be of legitimate concern to the formulators of national labor policy, it is inconceivable that in its effort to eliminate the work-site labor strife Congress intended to vest such enormous power in the hands of so few. Indeed, it is difficult to believe that Congress even imagined, in 1959, the type of vast multi-employer single union contracts that are the subject of this litigation. Surely, had Congress intended to create such unlimited top-down organizing power it would have attempted to reconcile the affected broad national policies. There is no evi-

dence of such an attempt at any point within the legislative history. In fact, the opposite seems to be the case. It is uncontroverted that the basic thrust of § 8(e) is to prevent the problems created by secondary boycotts and broad top-down organizing. And, although the construction industry proviso carves out an exception for that industry, it should not be interpreted to extend beyond the need for which it was created; that is, the need to eliminate the crippling effects of labor strife at the construction work site. The interpretation accorded the proviso by the Ninth Circuit goes far beyond the need to eliminate job site strife. It creates within the union the power not only to eliminate strife, but also to eliminate competition between the unions and, to the extent that the protected union can dictate which subcontractors will be blessed with agreements, to eliminate competition between employers and the firms with which they deal. Most importantly, the freedom of choice for employees, the cornerstone of national labor policy, is destroyed.

The net effect of such a broad grant of power to unions is to unbalance the competing federal policies to preserve the right of self-determination of employees, to eliminate combinations in restraint of trade, and to minimize work-site labor strife in the construction industry. It subverts the rights of workers and the federal anti-trust policies in favor of unlimited organizing power in the hands of union executives. Whatever the intent of the ambiguous legislative history of the LMRDA, it most assuredly was not to give unions more unfettered power. At a minimum the LMRDA was intended to protect employees' rights to organize, choose their own representatives and to

protect the free flow of commerce of the nation. Section 2, LMRDA. It was enacted, in part as a result of the demonstration of union abuses illuminated by the McClellan Hearings. Certainly, it could not have been Congress' intent to eliminate these abuses by granting unlimited organizing power to the few most powerful unions. Such a result must be universally recognized to be contrary to the purposes of the LMRDA when it is examined as a unified legislative effort.

III. THE APPLICABILITY OF THE CONNELL DECISION

The *Connell* case reached this Court on a complaint by the employer Connell, that the "specific union only" subcontracting clause in the master labor agreement with the union violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Connell sought a declaration that this provision was invalid and an injunction against any further efforts to force it to sign an agreement. 421 U.S. at 621. Unlike *Connell* these cases arrive at this Court through the processes of the NLRA. The cases involving Local 701 were brought on complaint of the Associated Builders and Contractors that the "specific union only" clause violated § 8(e). The case involving the Carpenter's Locals 235 and 944 was brought on complaints of the Woelke and Romero Framing Company that the Locals violated § 8(b)(4)(i) and (ii)(A) by picketing to require the employer to enter into an agreement which is prohibited by § 8(e). Thus, in the instant cases the primary issue was a determination of the scope of subcontracting clauses as they are permitted by the construction industry proviso of § 8(e).

In *Connell,* this Court approached the § 8(e) issue by first determining whether or not the conduct was

violative of federal anti-trust laws or whether because it involved organizing efforts of a labor organization it was immune from federal anti-trust policy. The *Connell* Court concluded that despite a strong labor policy favoring the association of employees to eliminate competition over wages and working conditions, that policy clearly does not require that a union have freedom to impose direct restraints on competition among those who employ its members. 421 U.S. at 622. The Court went on to explain that "the most favored nation" clause of the multi-employer agreement, in combination with the "specific union only" subcontracting clause, had the effect of giving Local 100 the power to control access to the market for mechanical subcontracting work. Importantly, the Court distinguished that:

> [t]he agreement with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that did not have a contract with Local 100.

421 U.S. 624. Thus, this Court has early recognized that there is a major distinction between a prohibition against contracting with non-union firms and a requirement to contract only with "specific union only" firms. This aspect of *Connell* is central to the primary issue in these cases.

Further, the Court recognized that this type of control could have significant adverse effects on the market and on consumers—"effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Id.* In sum, the Court concluded that although the union's goal of complete organization would be legal, the "methods

the union chose are not immune from anti-trust sanctions simply because the goal is legal." 421 U.S. at 625. The Court further held that such subcontracting clauses were a direct restraint on the business market and had substantial anti-competitive effects, both actual and potential, and thus contravened the "anti-trust policy to a degree not justified by congressional labor policies, and therefore cannot claim a statutory exemption from the anti-trust law." *Id.*

The Court then concluded that because the subcontracting agreement was not reached within the context of a collective bargaining relationship, the anti-trust aspects of the agreement could not be sheltered by the federal policy favoring collective bargaining. 421 U.S. at 628. The Court remanded the case for a factual determination regarding whether the agreement actually restrained trade within the meaning of the Sherman Act. 421 U.S. at 637. Significantly, the Court avoided determining whether the type of direct restraint created by the agreement actually violated the Sherman Act or might be entitled to an anti-trust exemption "if it were included in a lawful collective bargaining agreement." 421 U.S. at 628.

It would seem then that the *Connell* case was significant because it recognized that "specific union only" clauses *could* be violative of federal anti-trust policy. The decision implies, by the use of the language

> [t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an anti-trust exemption if it were included in a lawful collective-bargaining agreement.

421 U.S. at 625, that even in cases arising in the context of a collective bargaining relationship such clauses might not be entitled to immunity from anti-trust policy. And finally, it is significant that the Court recognized the need for a factual determination of the anti-trust issues as evidenced by its remand.

The Ninth Circuit, perhaps taking its lead from the decisions of the National Labor Relations Board, focused on the phrase in *Connell,* providing that

> [a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing, we are unwilling to read the construction-industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and in light of congressional references to *Denver Building Trades,* possibly to common-situs relationships on particular job sites as well.

Id. at 633. Cited partially at 654 F.2d 1301, 1321 (9th Cir. 1981).

The Ninth Circuit *erroneously* perceived this phrase to mean that a "specific union only" subcontracting clause would be immune from anti-trust restraints if it were to arise in the context of a collective bargaining relationship.

Although it seems clear that the *Connell* Court held that a "specific union only" subcontracting clause outside a collective-bargaining relationship is not entitled to the protection of the construction industry proviso, it does not follow that the converse is true; that is, if such a clause is found in the context of a collective bargaining relationship it would be cloaked

with absolute immunity from the restraints of the antitrust laws. Such a conclusion is callous to this Court's ever constant effort to maintain the delicate balance between the rights of employees, the federal anti-trust policies, and the goals of federal labor policy.

On the other hand, it would seem evident from the *Connell* Court's discussion of the pervasive effects of "single union only" subcontracting clauses on the anti-trust policy of this nation that such clauses are so extraordinarily powerful that to give them the protection of the § 8(e) construction *proviso* would have been to defeat the congressional purpose of limiting top-down organizing campaigns.

THE RELATIONSHIP OF "MOST FAVORED NATIONS" CLAUSES TO "SPECIFIC UNION ONLY" CLAUSES

The Court in *Connell* explored the relationship between "most favored nation" clauses to "specific union only" clauses, concluding that in combination they represented the potential for anti-trust violations. It is also true that the region-wide "specific union only" agreements, such as those contained in the contracts at issue in this case, possess the same devastating direct restraints on trade despite the absence of a "most favored nation" clause.

The only significant benefit to the employer to be achieved by "most favored nation" clauses is that he can be assured that the union will not give a competing contractor or subcontractor an economic advantage. However, in the context of broad "specific union only" subcontracting clause agreements the union is in the driver's seat regarding the terms of any agreement it may sign. Each employer negotiat-

ing with the union must understand with clarity that without such an agreement it is not in a position to bid for work within the construction industry covered by the master labor agreement. Therefore, the general contractor signatories to the master labor agreement need not be concerned that the union, in its desperation to organize other subcontractors or contractors, will be tempted to negotiate more favorable terms. If anything, because of the lopsided advantage that is granted to the union by enforcement of this type of clause, it is in a position to negotiate even higher costs of construction.

Additionally, because the general contractor can only subcontract to firms with *existing* agreements with the union, the union retains the power to determine which firm will be eligible to work upon any given project. And, because of this requirement, the organizing power of the union is not limited to any specific job site as required by § 8(e). Once it is understood that to be eligible to bid or to enter into a subcontracting agreement the prospective subcontractor must already have an effective agreement with the union, then it must be equally clear that the preexistence of this agreement requires that the subcontractor deal with this union on any project regardless of whether it is covered by the master labor agreement.

Because of this aspect of the "specific union only" clauses, the union has not only successfully organized those firms operating within the jurisdiction of the master labor agreement, it has for all practical purposes organized even those firms not working on a covered job site, but who might contemplate doing so at any time in the future, or on future job sites. The union has therefore effectively organized all of the

workers within its jurisdiction, within the geographic region, for an extensive period of time, without ever having spoken to, written to, or even seen one of the affected workers. No employee is allowed to vote or otherwise voice a preference for or against union representation.

When the enormity of the leverage that will be achieved by unions through the use of "specific union only" subcontracting clauses is seen in its true light, there can be no doubt that Congress, in its attempt to restrain the power of organized labor through the enactment of the Labor Management Reporting and Disclosure Act, never intended this preposterous result. Enforcement of these clauses would be the equivalent of destroying all rights of the worker to exercise his § 7 franchise. It would also permit labor unions to combine with their preferred general contractors or general contractor associations for the purpose of eliminating competition and setting costs and prices throughout the construction industry. The grotesque nature of this result is highlighted by the fact that this power would be unique to the construction industry unions.

Rather, it is respectfully submitted that the § 8(e) proviso is intended to carve out a subcontracting exception for the construction industry simply to permit unions to overcome possible organizing problems created by the itinerant nature of the industry, and was never intended to create in construction trade unions the preferential position that would be accorded them if the Ninth Circuit decision is affirmed.

IV. CONCLUSION

The opinion of this Court in *Connell* that "specific union only" subcontracting clauses were not immune from federal anti-trust policies is controlling, regardless of whether the clause is a product of a protected collective bargaining relationship. In light of the need to balance the rights of the individual worker and the federal anti-trust and labor policies, the construction industry proviso to § 8(e) must be interpreted to be a limited exception to the policy against secondary boycotts rather than as a grant of extraordinary power to the construction industry trade unions.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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No. 80-1798

WOELKE & ROMERO FRAMING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondents.

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 81-91

OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF DONALD SCHRIVER, INC., TOPAZ CONTRACTING AND DEVELOPMENT CO., INC. AND SULLIVAN AND ASSOCIATES IN SUPPORT OF PETITIONERS

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IN THE
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No. 81-91

OREGON-COLUMBIA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS OF
AMERICA, INC.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF DONALD SCHRIVER, INC., TOPAZ CONTRACTING AND DEVELOPMENT CO., INC. AND SULLIVAN AND ASSOCIATES IN SUPPORT OF POSITION OF WOELKE & ROMERO FRAMING, INC., PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., AND OREGON-COLUMBIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

INTEREST OF AMICI CURIAE*

The resolution of the issues in this case directly affects Donald Schriver, Inc., Topaz Contracting and Development Co., Inc. and Sullivan and Associates (amici curiae herein) who have also filed a petition for writ of certiorari from the District of Columbia Circuit which been docketed in this Court as No. 80-1257. A timely petition for rehearing

* Pursuant to Rule 36.2 of the Rules of this Court, written consents of the parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

from denial of certiorari was filed in Schriver-Topaz in August, 1981. The Court has decided not to act on the rehearing petition in view of the grant of certiorari in Woelke & Romero and Pacific Northwest [1].

In the Schriver-Topaz case, the labor organizations sought to obtain the identical restrictive subcontracting clauses involved in the Woelke & Romero case. Schriver and Topaz are contractors

[1] As Petitioners in Donald Schriver, Inc., et al v. NLRB, No. 80-1257, we have ascertained that the Court held a conference on the petition for rehearing in No. 80-1257 and took no action. It is believed that this lack of action is predicated upon the related and identical legal issue with respect to the restrictive subcontracting clauses and coercive efforts to obtain them involved in Woelke & Romero, Pacific Northwest Chapter of ABC and Oregon Chapter of AGC, Nos. 80-1798, 80-1808 and 81-91, in which certiorari was granted at the commencement of the October, 1981 Term.

who had no bargaining relationship with the labor organizations at the time the restrictive clauses were sought while in the case of Woelke & Romero and Pacific Northwest, the clauses were sought in the context of a bargaining relationship.

Schriver and Topaz (the amici curiae)* will be directly affected by the decision of the Court in these cases, for they have likewise urged upon this Court, in their petition, the illegality of the clauses involved as being violative of Section 8(e) of the Labor Act.

The cases are further interrelated in that one of the questions presented in the instant case deals with the legality of picketing to obtain a clause prohibited by Section 8(e).

Schriver and Topaz will also be directly affected by a decision of the Court on the legality of picketing to obt ain such clause. Before the NLRB when Schriver and Topaz and the instant cases

* Sullivan and Associates is a management consultant and charging party before the National Labor Relations Board who represents Schriver and Topaz.

were consolidated for oral argument, Schriver-Topaz urged the Board to find such picketing illegal whether or not the clause involved complied with Section 8(e). The undersigned counsel for Schriver-Topaz also appeared at oral argument before the NLRB as counsel for the Chamber of Commerce of the United States, as amicus curiae, and in that capacity made similar arguments on the illegality of the picketing on behalf of all the parties and urged the Board to re-examine and reverse its position in Northeastern Indiana Bldg. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964) (see Operating Engineers Local 701, et al. (Pacific Northwest, et al.), 239 NLRB 274, n. 2, and Carpenters Local No. 944, et al. (Woelke & Romero, et al.), 239 NLRB 241, n.2. The Board specifically refused to reverse this position in the Los Angeles Bldg. & Construction Trades Council (Donald Schriver, Inc., et al.), 239 NLRB 253, 269, n. 19, case. However, the decision in all the cases issued on the same day and were cross-referenced to each other.

See Carpenters Local No. 944 (Woelke & Romero, et al.), 239 NLRB 241, 243, n.5. Schriver and Topaz were likewise subjected to picketing by the unions' efforts to secure such clauses but the NLRB and the D. C. Circuit in Schriver-Topaz believed that such picketing was not violative of Section 8(b)(4)(A) because it was arguably condoned under Section 8(b)(7)(C).

A further interest of the amici curiae herein is that the ~~granting~~ REVERSAL of the ~~motion~~ PANEL by the Ninth Circuit in its en banc panel decision in the instant case relied upon the decision of the D. C. Circuit in Schriver-Topaz v. NLRB, 635 F.2d 859 (D.C. Cir. 1980, cert. denied, 49 U.S. L.W. 3822 (May 5, 1981), timely rehearing petition filed and pending).*

When Schriver-Topaz along with Pacific Northwest and Woelke & Romero were consolidated for oral argument before the NLRB in 1978, these cases were the first cases to be considered by the

* (See Appendix A - Woelke & Romero Framing, Inc. v. NLRB, No. 80-1798 petition for certiorari, p. 6, n. 6; p. 37, n. 37; p. 40.)

NLRB in formulating its policy under Section 8(e) of the Labor Act in light of this Court's decision in Connell Construction Co., Inc. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975).

Accordingly, the amici curiae will be directly affected by the outcome of the Court's decision in the instant cases

ARGUMENT

I

THE EFFECT OF THE ILLEGAL CLAUSES AND THE EFFORT TO OBTAIN THEM FROM CONTRACTORS WHO DO NOT HAVE A BARGAINING RELATIONSHIP MUST BE CONSIDERED AS PART OF THE "TOP DOWN ORGANIZING" IMPACT

The petitions for certiorari concern two separate cases of secondary boycott which were consolidated at both the Board [1] and appellate levels.

[1] The consolidation before the NLRB for purposes of oral argument in 1978 was a consolidation order that included Woelke & Romero Framing, Inc., Pacific Northwest Chapter of ABC, and Oregon-Columbia Chapter of AGC as well as Schriver-Topaz, the petitioners in No. 80-1257 (the amici curiae herein), and resulted in related interfaced decisions when issued by the NLRB on November 19, 1978.

These cases were consolidated before the Board because they each presented, in a somewhat different factual context, efforts by the labor organizations involved to secure subcontracting clauses that were arguably violative of Section 8(e). In consolidating these cases, the NLRB asked each of the parties how the Board should formulate its policies under Section 8(e) and Section 8(b)(4)(A) when efforts to secure clauses arguably violative of Section 8(e) are sought in light of the U. S. Supreme Court's decision in Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616 (1975), hereinafter referred to as Connell. These consolidated cases were the first occasion that the Board had to consider the Court's Connell decision as it applied to the securing of such contract clauses arguably protected by the construction industry proviso. The decision of the D. C. Circuit in Schriver and Topaz v. NLRB, No. 80-1257, was the touchstone for the en banc panel's reversal of the panel's decision in the instant case (see p. 6 , supra.)

The amici curiae are contractors that never had a bargaining relationship with a labor organization but were subjected to picketing to obtain the identical restrictive subcontracting clauses involved in Woelke & Romero Framing, Inc. v. NLRB, No. 80-1798. The labor organizations in Schriver-Topaz attempted to distinguish this Court's Connell decision by urging that the mere fact that the clauses in Schriver-Topaz were sought as part of a full collective bargaining agreement protected the picketing from the proscriptions of the Labor Act.

It is respectfully urged herein by the amici curiae that these clauses are overbroad and do not conform to the statutory language, the Congressional intent in the enactment of Section 8(b)(4)(A) and 8(e) and are inconsistent with the rationale of Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). The holding of this Court in the instant case with respect to the legality and permissible breadth of subcontracting clauses will have a direct

effect upon Schriver-Topaz and other similarly situated contractors from whom labor organizations may in the future seek subcontracting clauses. Whether and under what circumstances such clauses may be obtained from contractors that do not have a bargaining relationship with a labor organization is the question presented in Schriver-Topaz No. 80-1257, in which a timely petition for rehearing is pending

The instant case also presents the Court with its first opportunity to consider the legality of picketing to obtain clauses arguably violative of Section 8(e). In this case, the Court will consider that question in the context of picketing an employer who already has a bargaining relationship with the labor organization. Should the Court agree to hear the Schriver-Topaz case, the Court will have the opportunity of considering that question in the context of when there is no existing bargaining relationship at the time of the picketing or other coercive

pressure[2].

In Connell, the Court addressed the question of "top down organizing" as well as the permissible scope and breadth of secondary subcontracting clauses in the construction industry. The Board in its decision in the instant cases and in Schriver-Topaz attempted to limit Connell to the special facts involved in that case.

The Ninth Circuit in the instant case and the District of Columbia Circuit in Schriver-Topaz have adopted three different views of the legal scope of secondary subcontracting restrictions. The District of Columbia Circuit perceives no limitation upon such restrictions. They are enforceable at all present and future jobsites regard-

[2] The Schriver-Topaz case also presents the Court with the important question of whether a contractor who has no bargaining relationship with a labor organization may be subjected to any picketing to secure a subcontracting clause violative of Section 8(e) notwithstanding that it is tendered as part of a full collective bargaining agreement and notwithstanding that Section 8(b)(7)(C) would permit picketing for a reasonable period not to exceed 30 days

less of whether members of the signatory unions will be working at the jobsite and subcontracting restrictions apply to all contractors who have contracts with any craft unions affiliated with the District Council, not just to a particular union. The Ninth Circuit en banc majority limits secondary subcontracting restrictions to contractors having agreements with the same signatory union but applies them to jobsites where members of the signatory union are not working. The four dissenting Ninth Circuit Judges conclude the Court's phrase "particular job site" (421 U.S. at 635) places outside the Section 8(e) construction industry proviso subcontracting restrictions extending to any jobsite where the signatory contractor does not employ union members (dissenting opinion of J. Sneed,

2 Continued ...
if a lawful contract (one not including a clause prohibited by Section 8(e)) were tendered.

Schriver-Topaz also presents the question whether picketing to secure a "pre-hire" agreement that may voluntarily be entered into under Section 8(f) is violative of Section 8(b)(4)(A) even if such clause fell within the construction industry proviso.

Pet. App. 44, and of J. Farris, Pet. App. p. 50). ~~Connell at 421 U.S. at 635.~~

II

RESTRICTIVE SUBCONTRACTING CLAUSES WHERE SOUGHT IN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP ARE VIOLATIVE OF SECTION 8(e) [3]

Amici curiae in this section will limit their analysis to the restrictive subcontracting clauses involved in the Woelke & Romero case as these are the same clauses that are involved in the Schriver-Topaz case (certiorari pending). Schriver-Topaz as well as Woelke & Romero are carpentry subcontractors from whom the labor organizations involved sought to obtain these clauses through coercion.

[3] It is respectfully urged by the amici curiae that the Court reserve the question of the lawfulness of such clauses or the effort to obtain them where sought coercively from an employer who had no prior bargaining relationship with the labor organization and whether the effort to obtain such a clause either coercively or voluntarily is cured by merely including such clause in a tendered collective bargaining agreement (see Questions Presented in Schriver-Topaz v. NLRB, et al., No. 80-1257).

It is respectfully suggested that the Master Labor Agreement (MLA) and the Local Agreements involved in Woelke & Romero and Schriver-Topaz are outside the protection of the construction industry proviso to Section 8(e) because they are overbroad. Neither clause is limited to a particular jobsite nor confined to specific time periods. A signatory subcontractor such as Woelke and Romero or stranger contractors from whom the clauses are sought such as Schriver and Topaz have employees actually working on a jobsite who possess the craft skills Respondents customarily represent. Moreover, they apply to subcontractors who actually have no power to determine whether other subcontractors on the job will be union or non-union. See NLRB v. Denver Bldg. Council, 341 U.S. 675, 677 (1951) (job site picketing to force general contractor to cease doing business with non-union electrical subcontractor).

These restricted clauses are not limited to particular existent jobsites but apply to multi sites in futuro well

beyond the term of contract. The Connell opinion recognized the explicit prohibition on "top down organizing" contained in the provisions of the 1959 amendments, Sections 8(b)(4), 8(b)(7) and the safeguards to Section 8(f). These sections of the Act directly effectuate the statutory mandate of preserving employees' freedom of choice. Accordingly, this central policy necessarily limits the scope of the proviso. Therein Congress intended to exempt only those situations similar to Denver Bldg. where the union seeks to insulate its members from non-union employees on the same jobsite. Concurrent and primary Congressional concern to foreclose "top down organizing" dispels any inference that Congress intended any application of the proviso beyond that limited situation. Indeed, the legislative history canvassed in Connell demonstrated that only "certain secondary activities on the construction site" (421 U.S. at 630) were authorized by the proviso, and that those related only to the insulation of union

and non-union employees. 421 U.S. at 629-631. The Court significantly summarized its holding in the following language (421 U.S. at 635):

> "We therefore hold that this agreement which is outside the context of a collective bargaining relationship and not restricted to a particular job site ... may be the basis of a federal antitrust suit ..."

This accurately reflects the realities of the construction industry, yet, the restrictive clauses here would limit Woelke and Romero's subcontracting options even when the pressuring union would have no employees working who could be the object of any type of representative interest. The clause, as applied to Woelke and Romero is directly contrary to the particular jobsite restriction set forth in Connell, because the clause here is not limited to a particular jobsite. Thus, the clause is well outside the proviso because it cannot be determined in advance whether a particular union will have any legitimate representational interest on a future jobsite. Therefore, it can be readily

observed that such broad clauses encourage "top down" unionization of subcontractors in order to maintain their eligibility to bid on work made available by contractors restricted by such open ended provisions. Accordingly, the clauses here are not privileged under the construction industry proviso [4].

The Connell Court's reference (421 U.S. at 633) to "common situs relationships to particular job sites" which "possibly" could fairly fall in the construction industry proviso does not apply to a general contractor without employees or any subcontractor with or without employees. The sole situation permitted by the proviso is significant, but not unlimited -- it permits a labor organization to obtain a restrictive subcontracting agreement (limited to union contractors) from a contractor who

[4] This is not to say, however, that a union could lawfully force a general contractor without any relationship whatsoever with the pressuring union to execute an agreement and to limit subcontracts to union contractors solely because the restrictive clause is properly limited to that particular jobsite. Such a caveat nullifies the Connell Court's prerequisite of "a collective bargaining relationship" and broadens the proviso narrowed by Connell.

is already present on the jobsite and who has employees actually working who possess the same craft or skills as are normally represented by the pressuring union, provided the contractor has the authority to determine whether union or non-union subcontractors will perform other work on the jobsite. This view of the proviso accurately mirrors the 1959 legislative compromise not to overrule Denver Bldg. while permitting construction unions limited means of securing all-union jobsites [5].

[5] However, as set forth above, the major emphasis in Connell on limiting the Section 8(e) proviso to avoid undermining employee free choice, and the emphasis there and in NLRB v. Iron Workers, 434 U.S. 335 (1978), upon Congress's concern about "top down organizing" in the construction industry, requires the conclusion that such protected subcontracting agreements can only be enforced by coercive pressures after the contractor's employees have indicated either by union designation cards or a secret ballot election their choice of the signatory union as their collective bargaining representative, thereby establishing the requisite Section 9(a) relationship. Only such an accommodation cn properly balance and effectuate the competing interests reflected in Congress's compromise between employee representational interests and union objectives in securing all-union jobsites.

In addition to the overbroad feature described above, Section 103 of the MLA and Article IV of the Local Agreements are also unlawful under the Connell rationale because the subcontracting restrictions apply at all times during the term of the agreement regardless of whether Woelke and Romero have carpentry employees actually at work on a jobsite. The MLA clause applies to a wide variety of craft employees, none of whom, other than carpenters, are ever employed by Woelke and Romero. Thus, there can be no possibility of any representation interest on the part of these craft unions. Proper application of Justice Powell's analysis necessarily requires restrictive subcontracting clauses which contain language limiting their scope to those time periods when the signatory contractor actually has employees at work who are normally represented by the signtory union. Otherwise, unions could restrict the subcontracting discretion of employers with whom no bargaining relationship of any type could ever be established. Restrictions on contractors subcontracting discretion must take into

account and reflect the actual modus operandi of the particular contractor. For example, in the case of a typical carpentry subcontractor or a general contractor, such contractor's employees are usually not present when the initial excavation work is performed or when finishing work such as landscaping at the conclusion of the project is performed[6]. Yet the broad subcontracting clause would impose subcontracting restrictions on the signatory subcontractor with respect to work not performed by employees and work to be performed when his employees are absent from the jobsite.

Finally, both Sections 103 of the MLA and Article IV of the Local Agreements are outside the protection of the construction industry proviso because permissible subcontracting awards are limited only to those employees with relationships to unions affiliated with the Council rather than to any labor organization. Such provisions exceed the scope of the limited purpose of Section

[6] These were the facts stipulated in the Schriver-Topaz record.

8(e) proviso. At most, Congress intended, in certain limited circumstances described above, to permit the segregation of union and non-union employees at a particular jobsite, not segregation between members of different labor organizations. There is no legitimte labor law policy served by an agreement that reserves a construction site for members of a particular union to the exclusion of employees belonging to different unions. Such a plain incursion upon employees' freedom of choice finds no support in the 1959 legislative history. Such clauses would result in the exclusion of all rival unions on a construction site by means of the very "top down" organizing device condemned by Congress in the construction industry proviso to Section 8(e). The obvious impact of such an exclusion would impermissibly discourage employees changing representation from included to excluded unions because of the consequential loss of employment opportunities. Cf. Radio Officers' Union v. NLRB, 347 U.S. 17

(1954). Likewise, it would provide an unlawful economic incentive for such employees initially to select an included union over an excluded union to avoid the same unwelcome consequence. It is plain then that these restrictive clauses primarily and thus unlawfully serve the illegitimate function of bringing economic pressure on non-union contractors and their employees to accept unionization to establish eligibility for subcontract work regardless of the actual wishes of the non-union craft employees.

There is, of course, no justification for considering even the existence of a collective bargaining relationship to privilege restrictive subcontracting clauses regardless of the scope of the clause. The Connell Court's concern for the breadth of such clauses was explicit. Thus the Court twice stated that subcontracting clauses must also be restricted to a particular jobsite and directly related to employee interests in common sites relationships. 421 U.S. at 632 and 635.

III

SECTION 8(b)(4) PROHIBITS PICKETING TO OBTAIN RESTRICTIVE SUBCONTRACTING CLAUSES IN THE CONSTRUCTION INDUSTRY

Without regard to the presence or absence of a collective bargaining relationship, picketing or threats to picket by labor organizations to obtain union signatory clauses is banned by Section 8(b)(4)(A) of the Act. The Board's and the en banc panel's holding that picketing to obtain a subcontracting clause is protected by the construction industry proviso should be overturned by the Court. Assuming arguendo that the subcontracting clauses are proviso protected, the Board's reaffirmation of its holding in Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964), enfmt. denied on other grounds, 122 U.S. App. D.C. 220, 352 F.2d 606, (1965), adopted by the en banc panel, that a labor organization can lawfully picket to obtain such clauses is no longer tenable.*

* The Law prior to Centlivre, supra, is best summarized in the decision of the Trial Examiner in that case:

First, in 1959, Congress intended to preserve existing law with respect to subcontracting clauses, and existing law was that jobsite picketing to obtain such

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* Continued from previous page ...

"Thus, the issues here are brought squarely within the Colson and Stevens line of cases (Construction, Production and Maintenance Laborers Union Local 383, AFL-CIO, et al (Colson and Stevens Construction, Inc.), 137 NLRB 1650) in which the Board has repeatedly held that although the Section 8(e) proviso allows the described "hot cargo" type agreements in the construction industry on a voluntary basis, when coercion is used to obtain such agreements, Section 8(b)(4)(A) is violated, and trhe same conduct also violates the secondary boycott provisions in Section 8(b)(4)(B)." (Trial Examiner's Decision, Northeastern Indiana Bldg. Trades Council, supra, 148 NLRB 863).

a restrictive "hot cargo" agreement violated Section 8(b)(4)(A) (now Section 8(b)(4)(B)). The Board's present position is contrary to the intent of Congress. Second, the intervening Connell and Iron Workers decisions, supra, have re-emphasized the potential for subcontracting clauses to become "top down" organizing tools. As the stipulated facts of this case show, such clauses have the obvious consequence of forcing craft employees to become union members in order to secure for themselves the employment opportunities such clauses restrict to unionized contractors. This consequence is clearly foreclosed by the Connell Court's holding that union shoulder-to-shoulder interests reflected in Section 8(e) are not paramount to, but are subservient to, the primary purpose of the Act to protect the right of employees to "bargain collectively through representatives of their own choosing." (Section 7 of the Act.

Sections 8(e) and 8(b)(4)(A), prohibiting voluntary "hot cargo" agreements and union coercion to obtain such agreements, were enacted in 1959 to eliminate loopholes in the statutory secondry boycott prohibitions. These amendments responded to the decision in Carpenters v. NLRB, 357 U.S. 93 (1958) (hereinafter "Sand Door") wherein the Court ruled that picketing to enforce a "hot cargo" agreement was unlawful, such an agreement voluntarily entered into was permissible. In proscribing "hot cargo" agreements, Congress allowed a narrow exception for the construction industry. The first proviso to Section 8(e) authorized such agreements for work performed at a construction site if voluntarily agreed to. Legislative history uniformly demonstrates that the proviso was intended merely to preserve in that industry the law existing prior to 1959 [7]. The then existing law which Congress was aware of and about which it disclaimed any purpose to change

[7] The House Conference Report explained:

> "The committee of conference does not intend that this proviso should be construed so as to change

prohibited coercion to obtain or initially secure adherence to restrictive subcontracting clauses. Prior to 1959

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[7] Continued ...

"the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts will be illegal under the Sand Door case .... To the extent that such agreements are legal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only to Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4).

* * * *

"The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.

* * * *

"It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract. H.R. Rep. No. 1147 on S. 1555, 86th Cong. 1st Sess. 39-40 (1959)."

picketing of any person to obtain a hot cargo agreement violated Section 8(b)(4)(A), now Section 8(b)(4)(B) [8].

From this legislative history, it logically follows that if transmitting proscribed pressures through the contractual provisions to the moment of boycott are prohibited, these same pressures, applied at the inception of the contract, likewise were intended to be proscribed by the pre-1959 statute. Otherwise initial concern to obtain an agreement to boycott other contractors may be effectively transmitted to that later moment when the contractor honors the agreement - the very result Congress originally intended to prohibit in 1947. Therefore, the seeking of such restrictive agreements to be applied in the future was, like coercion to enforce such a boycott, an object proscribed by

[8] Bricklayers, Int'l Union of America (Selby-Battersby & Co.), 125 NLRB 1179 (1959); Bangor Building Trades Council, 123 NLRB 484 (1959), enf'd, 278 F.2d 287 (1st Cir. 1960); Texas Inds. Inc., 112 NLRB 923 (1955), enf'd, 234 F.2d 296 (5th Cir. 1956).

the original Section 8(b)(4)(A) enacted in 1947. In adopting this preexisting law, the 86th Congress exempted only voluntary agreements in the construction industry. As Congressman Barden explained:

> "The first proviso under subsection (e) of section 704 permits the making of voluntary agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." Vol. II, Leg. Hist. of LMRDA at 1715.

Notwithstanding this express Congressional condemnation of coercion efforts to obtain "hot cargo" agreements, the Court of Appeals for the District of Columbia reached a contrary result in Orange Belt District Council of Painters v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964) [9]. Thereafter, the Board

[9] See also Laborers Union, Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963); Bhd. of Carpenters v. NLRB, 332 F.2d 636 (3rd Cir. 1964).

after first reaching a result fully consistent with the above noted Congressional intent, acquiesced to the Circuit Court's literal reading of Section 8(b)(4)(A), and "legalized" coercive efforts to obtain union signatory clauses. Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apts.), 148 NLRB 854 (1964), enf'mt. den. on other grounds, 122 U.S. App. D.C. 220, 352 F.2d 606 (1965). Not only is Centlivre contrary to the unambiguous intent of Congress detailed above, but its holding and rationale is also overruled by the intervening Connell and Iron Workers decision, supra, which conclusively undermine the supporting analysis which is the predicate for the Board's Centlivre holding.

What Connell did hold of major significance here is that the terms (and type of) subcontracting agreement protected by the proviso is narrower than previously construed by the Board and the courts. Because the exemption is narrowed, Section 8(e) prohibitions are correspondingly expanded. Accordingly, Section 8(e) prohibitions must be given wider scope to accommodate the Connell

rationale. The touchstone now must be that Section 7 rights prevail over any foreseeable consequences, direct or indirect, that a form of subcontracting restrictions will exclude non-union employees from jobsites regardless of representational interests of the affected employees.

Iron Workers, supra, affirms Congress's intent to authorize only voluntary § 8(f) agreements, and thus, whenever § 8(e) clauses are included in § 8(f) agreements, as in Schriver-Topaz, coercive efforts to obtain initial employer acceptance is contrary to this unequivocal legislative intent. The limitation upon the scope of the construction industry proviso now made explicit in Connell, and the limitations upon the scope of § 8(f) agreements affirmed in Iron Workers, supra, are both premised upon identical federal labor policy -- the primary purpose of the NLRA is to fully effectuate the free choice of employee representational interests. The analysis adopted by the Court in these two recent decisions eschews narrow review of a single term or provision of

a single term or provision of the Act, as in Orange Belt District Council Painters v. NLRB, supra, and properly considers "the provisions of the whole law, and ... its object and policy." Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956); Accord: Golden State Bottling Co. v. NLRB, 414 U.S. 168, 177 (1973); NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957). Otherwise, coerced contractual arrangements entered into between employers and unions in the construction industry would provide a means of frustrating the NLRB's protection and effectuation of employee rights. NLRB v. Pipefitters, Local 638, 429 U.S. 507, 517-21 (1977); National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940). Accordingly, Centlivre must now be reversed.

CONCLUSION

For all the foregoing reasons and the reasons presented by the Petitioners, the amici curiae respectfully urge the Court to set aside the holding of the

en banc panel and affirm the position of Petitioners.

Respectfully submitted,

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